TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 30

OHIO EX REL. EATON, APPELLANT,

vs.

PRICE, CHIEF OF POLICE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED FEBRUARY 12, 1959
PROBABLE JURISDICTION NOTED JUNE 8, 1959

SUPREME COURT OF THE UNITED STATES

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[fol. 2]

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

No. 111,465

THE STATE OF OHIO, ex rel. ARTHUR T. EATON,
488 Shiloh Dr., Dayton, Ohio,

vs.

PAUL J. PRICE, Chief of Police Department of City of Dayton, Ohio, Safety Building, Dayton, Ohio.

HABEAS CORPUS PETITION AND ORDER GRANTING

Now comes Arthur T. Eaton and represents to the Court that Earl Taylor, 130 Henry Street, Dayton, Ohio is unlawfully imprisoned, restrained and deprived of his liberty by Paul J. Price, Chief of Police of the City of Dayton, Ohio, under and by virtue of a certain pretended instrument of writing, of which a true copy is hereto attached, marked "A".

Said petitioner—therefore pray—that a writ of Habeas Corpus may issue, and that upon hearing thereof he may be discharged, and for all proper relief.

Arthur T. Eaton.

The State of Ohio, Montgomery County, ss.

Arthur T. Eaton being duly sworn, says that statements contained in the foregoing petition are true to the best of his knowledge and belief.

Sworn to before me by said Arthur T. Eaton and by him [fol. 3] subscribed in my presence, this 26th day of March 1957.

Fred M. Kerr, Notary Public in and for the County of Montgomery, and State of Ohio.

(Over)

On the application of Arthur T. Eaton and upon his filing the petition herein, a Writ of Habeas Corpus is granted as prayed for in the petition, returnable forthwith.

Thomas, Judge of the Common Pleas Court of Montgomery County, Ohio.

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Common Pleas Court
The State of Ohio

.....

vs.

.....

Habeas Corpus Petition

Filed ..... 19....

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Probate Judge.

Recorded in Record No. .....

Page ..... Box .....

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Attorney.

[fol. 4]

Attachment "A" to Habeas Corpus Petition

Writ of Habeas Corpus
When In Custody of an Officer
Gen'l Code, Sec. 12169

#111465

Common Pleas Court of Montgomery County, Ohio

The State of Ohio, Montgomery County, ss.

To the Sheriff of Montgomery County, Greeting:

Serve: Paul J. Price, Chief of Police

We command you that the body of Earl Taylor of 130 Henry Street, Dayton, Ohio by you imprisoned and restrained of his liberty, as it is said, you take and have before the Hon. Don R. Thomas, a Judge of our Common Pleas Court of Montgomery County, Ohio (or in case of his absence or disability, before some other Judge of the

same Court,) at the Court House in said County, forthwith, to do and receive what said Judge shall then and there consider concerning him in his behalf; and that you then and there appear before said Judge to show the cause of the taking and detention of the said Earl Taylor and make due return of this writ, in writing, as required by law.

WITNESS my signature and the seal of said Court this 26th day of March 1957.

F. M. Krebs, per U. H. Boll Deputy Clerk of said Common Pleas Court Montgomery County, Ohio.

[fol. 5]

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

SHERIFF'S RETURN

Gen'l Code, Sec. 12174

Sheriff's Office, Montgomery County, Ohio.

March 26, 1957

Received this Writ this 26 day of March 1957 and in pursuance of the command thereof I served the same by handing a true copy thereof with the endorsements thereon personally to Paul J. Price, Chief of Police, City of Dayton, Ohio, on March 26, 1957.

Bernard L. Keiter, Sheriff
C. E. Shuey,
R. Davis.

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No. .....
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..... Court
..... County, Ohio.

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The State of Ohio, ex rel.

.....

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Habeas Corpus
Returned and Filed
..... 19.....

[fol. 5a]

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

No. 111,465

STATE OF OHIO, ex rel. ARTHUR T. EATON, Plaintiff,

—vs.—

PAUL J. PRICE, etc., Defendant.

DECISION—May 21, 1957

Thomas, J.:

This matter is before the Court on the issue of whether or not the petitioner is illegally restrained of his liberty.

The plight of the petitioner grows out of an ordinance of the City of Dayton, Ohio, which said ordinance is designated "An ORDINANCE establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation."

The ordinance provides, among other things, that the owner or occupant of every dwelling, dwelling unit, rooming house and rooming unit shall give the housing inspector free access to such dwelling, dwelling unit, rooming house or rooming unit, and its premises, at any reasonable hour for the purpose of inspection, examination and survey.

The ordinance also provides that any person who shall violate any provision of this ordinance, upon conviction, [fol. 5b] shall be punished by a fine of not less than $20.00 nor more than $200.00, or by imprisonment of not less than two days nor more than thirty days, or both.

The petitioner refused to permit housing inspectors to enter his home on several different occasions without a search warrant, and pursuant to the penalty provision of the ordinance he was arrested by the Police Department of the City of Dayton, Ohio, for the violation of said ordinance, namely, refusing to allow a housing inspector to enter his private dwelling for the purpose of making an inspection of his premises.

After petitioner's arrest, his counsel filed a petition for a Writ of Habeas Corpus in the Common Pleas Court of Montgomery County, Ohio, and the writ was allowed. The case then came on for hearing upon the merits.

A most serious question is involved in this matter,—one that is highly controversial, primarily for the reason that there is a feeling in the hearts of most men that every man's house is his castle. This maxim is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.

The eloquent passage in Chatham's speech on General Warrants is familiar to many people:

> "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."

[fol. 5c] On the other side of this question are those who believe that when any legislative body enacts a law under the label of police power, it becomes sacrosanct, and constitutional objections concerning same should be treated as technical rather than as real and legitimate.

As we enter and become involved in modern-day, complex living conditions, laws and regulations unheard of and unknown a few years back are now becoming ostensibly necessary for the protection of the general public. The scope and effect of these laws naturally become debatable and polemic, as some go so far as to limit and restrict our established rights. The ordinance in question is one of such laws which affects one of our natural rights.

One facet of the ordinance of the City of Dayton, Ohio, which has brought the petitioner before this Court comes directly in contact with the Fourth Amendment of the Constitution of the United States, and Section 14 of the Bill of Rights of the Constitution of the State of Ohio. They read as follows:

> "AMENDMENT IV. The right of the people to be secure in their persons, houses, papers and effects,

against unreasonable searches and seizures, shall n
be violated and no warrants shall issue but upon pro
able cause, supported by oath or affirmation, a
particularly describing the place to be searched, a
the person or things to be seized."

"SECTION 14. SEARCH WARRANTS. The right of t
people to be secure in their persons, houses, pape
and possessions, against unreasonable searches a
seizures shall not be violated; and no warrant sha
issue, but upon probable cause, supported by oa
[fol. 5d] or affirmation, particularly describing t
place to be searched, and the person and things to
seized."

In our search for authorities on our question, we hav
found only three cases in the United States that thro
any direct illumination on this issue:

District of Columbia v. *Little*, 178 Federal, 2d
United States Court of Appeals, District
Columbia Circuit, decided August 1, 1949.

This case involved Geraldine Little, who was convicted
the Municipal Court for the District of Columbia for inte
fering with an inspector of the Health Department in t
performance of his duty by refusing to unlock the do
of her home at the command of the inspector who w
without a warrant.

The conviction was reversed on appeal to the Municip
Court of Appeals for the District of Columbia, *62 A. 2d 8*
and the District appealed. The Court of Appeals, by tw
to-one decision, affirmed the judgment of the Municip
Court of Appeals, construed the Fourth Amendment a
held that it prohibited the inspector from entering defe
dant's home over her protest and without a warrant. T
Syllabus in this case is as follows:

"1. Searches and seizures.

The Constitutional prohibition against unreasonab
searches, by implication permits reasonable searche
but reasonableness without a warrant is adjudge
solely by extremity of circumstance of the moment a

not by any general characteristic of the officer or his mission.

2. Searches and seizures.

Except for the most urgent of necessities, the ques-
[fol. 5e] tion of reasonableness of search is for a magistrate and not for enforcement officer.

3. Criminal law. Searches and seizures.

The provision of Fourth Amendment regarding searches precludes searches of homes by government officers without a warrant, regardless of whether officers are searching for evidence of crime or whether they are searching for something else, or just searching, and provision is not limited by Fifth Amendment that no person shall be compelled to be a witness against himself.

4. Searches and seizures.

The basic premise of constitutional prohibition against unreasonable searches was not protection against self-incrimination, but was the common law right of a man to privacy in his home.

5. Searches and seizures.

The Fourth Amendment was a precautionary statement of the lack of federal power, coupled with a rigidly restricted permission to invade the existing right, and the guaranteed right already belonged to the people.

6. Searches and seizures.

No matter who the officer is or what his mission, a government official cannot under the Fourth Amendment invade a private home, unless a magistrate has authorized him to do so, or an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate, and the right of privacy is not conditioned upon the objective or the prerogative or stature of the intruding officer.

7. Searches and seizures.

Under Fourth Amendment an officer may not enter
[fol. 5f] a home without a warrant even if he has rea-

sonable ground to believe that a person therein has committed a felony, unless compelling circumstance requires it.

8. Searches and seizures.

The fact that a definite complaint had been made that defendant's home contained an accumulation of loose and uncovered garbage and trash in the halls, did not entitle inspector of Health Department to enter to make an inspection over defendant's protest and without a warrant.

9. Searches and seizures.

No difference between the words 'inspect' and 'search' exists in regard to the provision of Fourth Amendment prohibiting unreasonable 'searches' of homes, and inspector of Health Department was required under the amendment to obtain a warrant to 'inspect' defendant's home over defendant's protests.

10. Searches and seizures.

An act of Congress purporting to permit the invasion of homes by police officers without warrant, except under the established exception of unavoidable crisis, would be void under Fourth Amendment.

11. Searches and seizures.

Under the Fourth Amendment inspectors of Health Department without a warrant could not invade a private home to see that it was clean and wholesome, or to search for garbage upon a complaint that garbage was accumulated in hallways, or to see whether occupants had failed to avail themselves of toilet facilities therein.

12. Municipal corporations.

Municipal regulations which protect the public health, [fol. 5g] prevent nuisances and the like, applicable by terms and practice to conditions infringing upon the public interest are valid.

13. Searches and seizures.

Fact that Congress in enumerating in statutes the articles or things for which search warrants could be

issued in District of Columbia, did not refer to articles or things offending health laws, did not authorize inspector of Health Department to inspect a private home without a warrant and over protests of owner."

It should be noted that Judge Holtzoff, in his dissenting opinion, referred to the case of *Hubbell* v. *Higgins*, 148 Iowa, p. 36, which case involved the inspection of a hotel. The fourth paragraph of the syllabus of the case reads:

"The legislature in the exercise of its police power may provide for the inspection of hotels in the interests of public safety and health, and this right of inspection is a mere incident of such power, an exercise of which violates no constitutional guarantee against the right of entry upon private property and search without due process of law."

We do not believe this proposition of law has ever been questioned where any business has been licensed, but we do not know of any law that would compel one to seek a license to live in a private home.

A Writ of Certiorari was granted by the United States Court of Appeals on November 7, 1949, and the case was heard before the Supreme Court of the United States of America at the October Term 1949, and decision made February 20, 1950, in *District of Columbia* v. *Little*, 339 U.S. 1. The Court held:

[fol. 5h] (1) Respondent's mere refusal to unlock the door on substantial constitutional grounds was not the kind of interference prohibited by the regulation.

(2) The foregoing conclusion makes it unnecessary to decide whether the Fourth Amendment forbade the health officer to enter respondent's home without a search warrant.

It should be pointed out that Justice Douglas took no part in the consideration or decision of the case, and that Justice Burton and Justice Reed dissented.

During our search for authorities, the legal staff of the City of Dayton, Ohio, gave the Court a decision which they

believe substantiates and upholds their theory of this matter. It is—

> *Girner* v. *State of Maryland*, Court of Appeals of Maryland, decided July 12, 1956, reported in 124 Atlantic Reporter, 2d series.

This case is an example of what we have said previously, namely, that our question is highly controversial. The Maryland Court of Appeals sustained the validity of certain inspection ordinances of the City of Baltimore, Maryland, —not upon any judicial precedent, but upon a statement (not dictum) made by the Supreme Court of the United States in the *Little case*, to the effect that there were certain contentions advanced in support of uniform Municipal inspection ordinances without search warrants.

The Maryland Court merely stated it would follow one of the contentions:

> "In these circumstances we consider the proposed inspections reasonable, and in our opinion the case falls within one of the intermediate constitutional conten- [fol. 5i] tions stated in the Little case under which 'municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants.'
>
> We hold that such inspections are not unreasonable and hence are not unlawful. If we are correct in our view that the inspections here involved are not unreasonable, they do not involve any violation of the 14th Amendment."

In fact, the Maryland Court of Appeals adopts the minority view of the Supreme Court in the *Little case*. Mr. Justice Burton, in the dissenting opinion, said—

> "In my opinion * * * the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as

is required by the Fourth Amendment to protect the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

Factually, the Maryland case differs greatly from the *Little case* and the one at bar; the Maryland case arose out of an attempted inspection of an apartment building, while the *Little case* and the instant case arose out of attempted inspections of private residences. It may be argued successfully that the Fourth Amendment is not binding on the States; however, we should not lose sight of the fact that the people of Ohio reserved for themselves the right to be secure in their homes by enacting Section 14, Article 1 of our Constitution, which is identical in meaning and form (with the exception of two words) to the Fourth Amendment of our federal constitution.

The proponents of ordinances which provide for the unlimited number of inspections of private homes, at rea- [fol. 5j] sonable hours, contend that the execution of these ordinances does not violate the right to privacy in homes provision of the Constitution, for the reason that housing inspectors are not permitted to use force or violence in gaining admission into one's home, and the only difficulty and inconvenience that could befall one who would refuse to admit an inspector is that he merely goes to jail. Therefore, the whole arrangement is quite constitutional. This ingenious reasoning produces a distinction in methods employed, but without a difference in the end result.

We should be mindful that immunity from search and seizure is not from all search and seizure, but from search and seizure unreasonable in the light of common law traditions. Therefore, it would be safer for all legislative bodies to regard all searches as unreasonable which have hitherto been unknown to the law, leaving the parties and the public to the accustomed remedies.

It is true that present-day living conditions have brought about many problems which require the relinquishment of certain of our rights for the benefit of the greater number of our people, but just how far we are to go in this respect

should be a matter of great concern, and should be approached slowly, cautiously and carefully.

As a part of our decision, we adopt and follow the law pronounced in—

> *District of Columbia* vs. *Little*, 178 Federal (2d) 13, United States Court of Appeals, District of Columbia Circuit;

and we cannot overlook the statement made by the Supreme Court of The United States in reference to the conviction of Geraldine Little in the Municipal Court for the District [fol. 5k] of Columbia, for refusing to unlock the door of her home at the behest of an inspector who was without a warrant. The last paragraph of the Supreme Court's decision is most dynamic and revealing. It reads—

> *"Had the respondent not objected to the officer's entry to her house without a search warrant, she might thereby have waived her constitutional objections. The right of privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than respondent did here. The judgment of the Court of Appeals affirming the Municipal Court of Appeals judgment setting aside the conviction is affirmed."*

In conclusion, we are of opinion and hold that petitioner's constitutional rights were not affected by the enactment of ordinances 806-27 to 806-83 of the general ordinances of the City of Dayton, Ohio, and that in refusing to admit housing inspectors he elected to exercise his constitutional objection.

This case is distinguishable from *Cogan* v. *City of Dayton, et al.*, decided by Judge Robert U. Martin, of this court, in that our case involves a private home, while the *Cogan case* involved a rooming house operation amenable to the licensing provisions of the ordinances of the City of Dayton.

Therefore, the petitioner is ordered discharged from the custody of the Police Department of the City of Dayton, Ohio.

Counsel may prepare the proper entry.

Mr. Arthur T. Eaton, Attorney for Plaintiff.
Herbert S. Beane, City Attorney, Attorney for the Defendant.

[fol. 6]

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

No. 111,465

ARTHUR T. EATON, ex rel. EARL TAYLOR, Plaintiff,

vs.

PAUL J. PRICE, Defendant.

ENTRY OF JUDGMENT—June 10, 1957

This day came Paul J. Price, Chief of Police Department of the City of Dayton, Ohio, to whom a writ of habeas corpus was directed upon the application of Arthur T. Eaton, ex rel. Earl Taylor, and having with him the body of said Earl Taylor, together with said writ, and the day and cause of the caption and detention of said Earl Taylor as commanded in said writ; and thereupon the proofs and allegations of the parties being heard and considered upon the only issue raised by the parties, namely, the constitutionality of Section 806-30 of the Code of General Ordinances of the City of Dayton, Ohio, being ordinance No. 18099 as it applies to the factual situation in this case, the Court Finds that Section 806-30 is unconstitutional as it applies to the facts in this case as violative of the Fourth Amendment to the Constitution of the United States, and Article 1, Section 14 of the Constitution of the State of Ohio, and that the said Earl Taylor was within the privilege of his constitutional rights in refusing to grant housing inspectors free access to the dwelling he occupied, without

[fol. 7] a search warrant and without showing a most urgent necessity to enter the home he occupied; and it is therefore ordered that said Earl Taylor be and is hereby discharged from the custody of said Paul J. Price, Chief of Police Department of the City of Dayton, Ohio, and that he go hence without day and that the costs of this proceeding taxed at $——— be paid by the County Treasurer on warrant of the County Auditor therefor, as provided by law.

Exceptions of defendant noted.

Approved: Thomas, Judge.

.....
City Attorney

.....
Attorney for Earl Taylor.

[fol. 10]

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

No. 111,465

THE STATE OF OHIO, ex rel. ARTHUR T. EATON,
Plaintiff,

vs.

PAUL J. PRICE, Chief of Police Department of City of
Dayton, Ohio, Defendant.

BILL OF EXCEPTIONS

Hearing before The Honorable Don R. Thomas, Judge of the Common Pleas Court of Montgomery County, Ohio, April 8, 1957.

[fol. 17] April 8, 1957.

APPEARANCES:

Arthur T. Eaton, for the Plaintiff.

Herbert S. Beane, City Attorney, By Joseph P. Duffy, Assistant City Attorney, for the Defendant.

Opening Statement of Mr. Eaton

Mr. Eaton: Your Honor, we are here this morning in case No. 111,465, Writ of Habeas Corpus, questioning the right of the City of Dayton to charge and hold the defendant, Earl Taylor, on a charge of refusing to permit, refusing entry to City housing inspector, that case being a charge in the Municipal Court in the City of Dayton, Ohio, in case No. 163,162.

The facts are, your Honor, that the defendant and his wife, Mrs. Nina Taylor, live at 130 Henry Street, Dayton, Ohio, and have lived there for eleven years. The defendant is a life-long resident of the City of Dayton; has been a plumber for most of his life; has been a member of the plumbers' union for, I believe, about forty-eight years. He has never been in any difficulty with the law. The other day, when he was in this court, was the first time he had ever been in a court room in his life.

He and his wife, Nina, live at 130 Henry Street, and that is a private residence. There are no roomers or boarders; there is no commercial business or store or retail or anything like that. It is a private home.

The evidence will show it is a private home, and that no one lives there except Earl Taylor and his wife, Nina; that the house is a well constructed, clean, neat, sanitary, safe [fol. 18] home; that the city housing inspectors went there on three or four occasions, demanding a right of entry; that the defendant here, Mr. Taylor, requested and asked for information as to what they wanted and what they were looking for, and if there was anything wrong there at his house; that they couldn't give him any reason why they wanted in.

Mr. Taylor, on another occasion and on the occasion in question here, asked if the housing inspectors had any search warrant, which they did not have, and stated to Mr. Taylor that they didn't need any search warrant; they had a right to come in whenever they pleased and look through his house. This Mr. Taylor disputed, and consequently he was ordered into the office of the City Prosecutor, and was ordered to appear there on the 19th day of March, 1957, at 8:45 A. M., under an order here signed by William P. Keane, Prosecuting Attorney, Day-

ton, Ohio; and his wife, Mrs. Nina B. Taylor, was served with a notice to appear at the office of William P. Keane at the same time and at the same place. The markings on these notices show in quotation marks, "refused entry".

The charge filed against the defendant, Earl Taylor, of which I have a copy in my hand, reads as follows:

> "that on or about the 12 day of March, A. D. 1957, in the City of Dayton, and in the County of Montgomery and in the State of Ohio, did Earl Taylor, being the owner of premises located at 130 Henry Street, did unlawfully refuse to permit a duly authorized agent of the Division of Housing Inspection [fol. 19] of the City of Dayton, to enter and survey the said premises for the purpose of repairs or alteration as are necessary to comply with the provisions of minimum housing standards. Contrary to the form of the ordinances to-wit: Section 806.30 of Dayton, Ohio, in such cases made and provided and that said Earl Taylor is guilty of the fact charged; and further this deponent saith not."

That affidavit was signed by George Cooper, and notarized by a deputy of the Dayton Municipal Court.

The evidence will show, further, that the warrant, or the affidavit, or charge as designated here "Affidavit and Warrant" on the charge was served on the defendant by the Dayton Police Department, and he was ordered to appear on a date within a week after that, approximately a week after that, in the Municipal Court of the City of Dayton, in the Court of Judge Cecil Edwards.

The evidence will show that on the date that he was ordered in, he appeared in court and entered a plea of not guilty, and that at that time the Court ordered the defendant placed under One Thousand Dollar bond; that he was conducted to the jail, City of Dayton; was confined in the jail all of that day from about 9:30 in the morning until approximately four o'clock that afternoon when this writ of habeas corpus was filed.

Your Honor then heard the writ on the question of bond, and in view of the fact that the defendant has lived here

all his life, never been in any trouble, never had any criminal record of any kind and did voluntarily appear in the [fol. 20] Municipal Court as per instructions, the Court then released the defendant on his own recognizance, without bond.

We are here this morning on the question of the merits of the habeas corpus petition, and, of course, it is the contention of the defendant, Mr. Earl Taylor, that the affidavit filed against him does not contain facts sufficient to constitute a criminal charge, and that the ordinance, so far as it permits the entry of these inspectors into the private home without a search warrant, is unconstitutional.

We are questioning by the writ of habeas corpus the reasonableness of the ordinance, constitutionality of the ordinance and whether or not the law-abiding citizen, property owner, resident of the City of Dayton, must open doors of their home to any City inspector, with or without. We feel that the City has certainly overstepped the bounds of propriety, constitutionality, in passing this ordinance.

I wish to submit to your Honor a copy of the ordinance itself for the Court's consideration and information. It is Section 18099 of the Ordinances of the City of Dayton, passed by the City Commission on November 10, 1954. The pertinent section—and the section under which the affidavit was drawn—reads in part as follows:

> "The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the City of Dayton [fol. 21] in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit

and its premises at any reasonable hour for the pu
pose of such inspection, examination and survey."

And the ordinance contains a penalty section providin
a separate fine of not less than $20.00 nor more than $200.0
or by imprisonment of not less than two days nor mo
than 30 days, or both; and each day of failure to compl
with any such provision shall constitute a separate viola
tion.

So over a period of thirty days a resident could be fine
the sum of $6,000.00, nine hundred days in jail.

We are questioning the reasonableness of that ordinanc
We are questioning the reasonableness of the right
entry, and the constitutionality of the ordinance itself.
[fol. 22] have, and I will submit to your Honor the Co
stitution of the State of Ohio, the Constitution of the Unite
States and numerous decisions of the United States Su
preme Court and the State of Ohio which protect propert
owners and the citizen from such indiscriminate entry int
their homes.

We feel very definitely that the ordinance is unconstitu
tional, and that the law-abiding citizen of the City of Day
ton should be protected by this Court from indiscriminat
prying, knocking on doors, coming into private homes with
out any justification.

We feel that we are right 100%, and this is the case w
would like to have the Court decide on the merits and o
the law, determining whether or not under the ordinanc
these housing inspectors do have the right to enter privat
dwellings without justification and cause, without a searc
warrant. We feel when the Court hears the facts, th
Court will sustain the writ and release the defendant an
dismiss the charges against him.

Thank you.

Mr. Duffy: We have nothing, your Honor. We have n
opening statement. We contend, of course, the ordinanc
was validly passed, is constitutional, and we rest wit
that.

[fol. 23] MR. EARL TAYLOR, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Eaton:

Q. Will you state your name and your address, please?
A. Earl A. Taylor, 130 Henry Street.
Q. Is that Dayton, Ohio?
A. Dayton, Ohio.
Q. Are you married, Mr. Taylor?
A. Yes, sir.
Q. What is your wife's name?
A. Nina B. Taylor.
Q. When were you married? Approximately how long ago?
A. Eleven years ago in October, I think it was, or September.
Q. And are you living at 130 Henry Street?
A. Yes, sir.
Q. Are you living there with anyone?
A. No, sir.
Q. Is your wife living there?
A. Yes, sir.
Q. Is there anyone else living there?
A. No, sir.
Q. Are there any rooms for rent there?
A. No, sir.
Q. Any tenants of any kind?
A. Beg pardon?
[fol. 24] Q. Any tenants. Do you have anybody paying you rent that lives there?
A. No, sir.
Q. Describe to his Honor, Judge Thomas, what kind of a house this is.
A. Well, it is a little cottage, all on one floor, and it has a front room and a middle room, and I have a little extra bedroom, dining room and a little utility room, or what we call, for ice box and stuff like that, and we have a bathroom and little kitchen on the back.

Q. How many bedrooms?
A. Two.
Q. Who owns this property, Mr. Taylor?
A. It is my wife's name.
Q. I hand you here a deed and ask you if that is a dee to that property?
A. Yes, sir. That is what they gave us.
Q. That shows that the title to the property is in the nam of Nina B. Taylor?
A. That's right.
Q. And the deed is dated on the first of October, 1945?
A. That's right.
Q. Recorded on October 3, 1945?
A. Right.

Thereupon, paper writing was marked "Respondent' Exhibit A," introduced into evidence and made a part o this record.

[fol. 25] Q. That deed is for the premises where you live
A. Beg pardon?
Q. Are you a little hard of hearing?
A. Yes, sir.
Q. I say, that deed is for the premises where you live?
A. Yes, sir.
Q. Now, Mr. Taylor, have you had any experience wit the housing inspectors?
A. Have I had any experience with them?
Q. Yes.
A. No, I haven't.
Q. Have they ever been down there to your house?
A. The inspectors ever been to my house?
Q. Yes.
A. Yes, sir.
Q. On how many occasions?
A. They was there on three occasions.
Q. And what happened?
A. Well, the first time they came there, they just cam and said they wanted to come in the house and go through the house and inspect the inside of the house. They didn' have any credentials, or nothing, and that was a youn fellow—don't know his name—only thing he had was jus

a piece of paper, and he wanted to go through the house and inspect the house, and I said, "You have nothing to show me you have got a right to go through my house." He said, "We don't have to have," he said, "according to the law passed four years ago." I said, "That don't show me [fol. 26] that you got anything in there that you want for inspection, and, further, I don't have nothing in my house that has to be inspected." And he said, "Well, you know, according to this ordinance, that we got a right to go through your house and inspect your house." I said, "No, I don't think you have, unless you got a search warrant."

Q. Did they have a search warrant?

A. No, sir, they didn't. Only thing he had was a piece of yellow paper—tablet like that gentleman's got over there—so he stood there and argued. I said, "Until you get something to show me that you got a right to come into my house for inspection or what do you want to inspect in my house," I said then "you cannot come in." He said, "If that's the way you feel about it, we will just have to leave it up to the housing inspectors." I guess he meant down to the office. That was some young fellow. Then the second time the fellow came out he entered the same way, came up like that, and then he called me on the telephone, wanted to know if he could come to my house and inspect the inside of the house. I said, "Who are you, anyway?" He said, "I am the building inspector," or the housing inspector, and he said, "Well, I don't see what right that you got coming into my house." Until you show me in writing, or some kind of facts, that you got a right to come into my house and inspect the house, I will not let you in." And I said, "Furthermore, I know the building inspectors and I know the plumbing inspectors, the electric inspectors and all the rest of them." I said "I work at this business and I come in contact with them off and on; and as far as you coming in," I said "You can't come in." He said, "If I bring the inspectors out with me, could I come in?" I said, "No, you [fol. 27] can't come in, but I'll let the other inspectors come in if they want to come in, but you can't come in."

Q. Do you know who that was?

A. I don't know any more than you do. I don't know who he was. He was just a young fellow, and then I asked him.

I said, "How long have you been at this business as a housing inspector?" and he said, "I haven't been at it too long." He said it was about two or three months, something like that. I said, "Where do you get your information from to go into a person's house for inspections, or what you are going to inspect in that house?" He said, "Oh, we get it from these different inspectors." I said, "If the plumbing inspectors, electrical inspectors and all the rest of the inspectors go to work and tell you that kind of stuff, what to look for, to come into a man's house," I said, "I think that's a very loose piece of business."

Q. Did you ask him what they were looking for?

A. Yes, sir. He couldn't tell me. He said, "I want to inspect the whole inside of your house." He couldn't show me that, and that's the reason he didn't get in.

Q. The last time, what transpired?

A. The last time they was there a colored fellow and a white fellow, they came up to the door, and I walked out there, and he said, "Mr. Taylor?" I said, "Yes, sir." He showed, like a picture, he had a picture on a piece of paper, he held it in his hand and stuck it back in his pocket. He said the housing inspector wanted to inspect "your house." I said, "What do you have in there that you want to inspect?" I said, "I have nothing in my house for inspection." [fol. 28] He said, "We have a right to come in your house, go through your house, inspect the whole inside of your house." I said, "You have nothing wrote down on paper. You don't have a thing to show me you are going to come in there to inspect anything, and as far as that goes you aren't coming in unless you have a search warrant to get in."

Q. Did he have a search warrant?

A. No, sir.

Q. Did he ever come back with a search warrant?

A. No, sir. And, furthermore, he said, "If you ain't going to let us in, we are entitled to get in, and if you don't let us in" he said, "I am going to leave it up to the Prosecutor." I turned around and said, "I don't care what you do. You aren't coming in." He walked over and got in his car and that was the end of it.

Q. After that did you get a notice to appear?

A. I got those two notices there. I got one and my wife got one.

Q. Here is one here.

A. That is the one for me, yes, sir.

Q. And here is another?

A. And this is for my wife, and she wasn't home, and I went down. They sent them through the mail.

Q. These were served by registered letter?

A. Yes, sir.

Q. Notifying you to appear at the Office of the City Prosecutor?

A. That's right.

[fol. 29] Q. On the 19th day of March, 1957, at 8:45, is that correct?

A. That's right.

Thereupon, paper writing was introduced into evidence, marked "Respondent's Exhibit B" and made a part of this record.

Q. Mr. Taylor, did you go to the office of the Prosecuting Attorney in accordance with those notices?

A. No, sir, I didn't.

Q. Then what happened after that?

A. They sent the State Police out there with, I guess, a warrant or something to have me to appear in Police Court down here the following Tuesday.

Q. Were your taken and arrested by the officers at the time they came to your property?

A. Absolutely was not.

Q. They merely served you a warrant?

A. Merely served a warrant, a little affidavit telling me to appear down there, with my name, address, age, color of hair, eyes and all that.

Q. What date do you recall that was served on you?

A. Whatever the date is on them there. It was the next following Tuesday. I just don't recollect.

Q. Would that be on or about the 19th of March, 1957?

A. That's right, on a Tuesday.

Q. And then when were you ordered to Police Court?

A. I was ordered in court the next following Tuesday.

[fol. 30] Q. The following Tuesday that you were ordered in?

A. Yes, sir.

Q. What did you do on the following Tuesday when you were ordered in?

A. I went down to the court, and I was told to appear there at nine o'clock. I appeared there, and I was there on time when the case was called, and they called the case and I went up and answered the call, and he asked me whether I was going to,—you know, I took the oath—whatever you do—put your hand up, and asked if you plead not guilty. I asked for time set to get hold of somebody to see what I could do, and they wouldn't give me no time at all.

Q. You asked for the privilege of obtaining the services of an attorney?

A. Yes, sir. The only thing he said, he turned around to the bailiff, I think—somebody standing there beside me—and he said, "Well, make it $1,000.00 bond and lock him up." And I was locked up.

Q. Were you locked up at that time?

A. Yes, sir.

Q. What time of day was that?

A. That was right around 20 or 25 minutes after nine.

Q. And were you escorted to the city jail?

A. In the jail there. I think that's the city jail.

Q. Were you incarcerated? Put behind the bars?

A. Yes, sir.

Q. And how long did you remain there?

A. Until about 20 minutes of four.

[fol. 31] Q. The same day?

A. The same day.

Q. Under $1,000.00 bond?

A. Yes, sir.

Mr. Duffy: What was that last question, "Under $1,000.00 bond?"

A. Yes sir.

Mr. Duffy: What do you mean, "Under $1,000.00 bond?"

Mr. Eaton: He was held in lieu of $1,000.00 bond.

Q. Mr. Taylor, is this the charge that was filed against you in the City Municipal Court, Dayton, Ohio?
A. Yes, sir.

Mr. Eaton: I'd like to introduce that as Taylor's Exhibit "C".

Thereupon, paper writing was introduced into evidence, marked "Respondent's Exhibit C," and made a part of this record.

Q. Did your name appear in the newspapers, Mr. Taylor?
A. Yes, sir.
Q. Showing that you were in jail?
A. Yes, sir.
Q. Were you ever in jail before?
A. No, sir.

STIPULATION

Mr. Eaton: Your Honor, by stipulation, Mr. Duffy and myself have agreed that we will submit to your Honor, as a part of the evidence, a copy in book form of the ordi-[fol. 32] nance in question, being Section 18099 of the ordinances of the City of Dayton, passed by the Commission on November 10, 1954.

Mr. Eaton: Let that be marked as Taylor's exhibit "D", and of course the affidavit refers to subsection 30 of that ordinance.

Thereupon, pamphlet was introduced into evidence, marked "Taylor's Exhibit D" and made a part of this record.

Q. Mr. Taylor, looking back here at these notices here, "Respondent's Exhibit B" addressed to Mrs. Nina B. Taylor and ordering her to appear at the office of the Prosecuting Attorney on the date that mentioned above, was she there at the time that the entry was refused?
A. No, sir, she was not.
Q. She was ordered in along with you?
A. Yes, sir.
Q. What was your line of work, Mr. Taylor?
A. My what?

Q. Your line of work?

A. I am a plumber by trade.

Q. How long have you been a plumber?

A. Forty-eight years.

Q. Were you a member of the plumbers' union here in Dayton?

A. Yes, sir.

Q. How long?

A. I have been in the local ever since I started to learn [fol. 33] the trade. We had to join the local when we was an apprentice and had to serve four years, and after we served four years took the examination and went into the plumbers' local.

Q. About how long ago was that?

A. That was in October 26, 1914.

Q. Do you have any children?

A. Yes, sir.

Q. How many?

A. One girl.

Q. And do you have any grandchildren?

A. I got two grandchildren.

Q. Do they all live here in Dayton?

A. Yes, sir.

Q. Have you had any trouble with the house down there at all, any source of annoyance or trouble in your plumbing or electrical wiring or anything like that?

A. No, sir, none whatever. It is in absolutely first-class condition.

Q. Now on the 12th day of March 1957, the last time they were there,—George Cooper, housing inspector, he was there, wasn't he?

A. Yes, sir. He was a colored fellow and a white fellow.

Q. Did you ask him at that time whether he had a search warrant?

A. No. I asked him if he could show me an entry to get in the house. He said, "We don't need no entry to get in the house." I said, "If you are going to get in my house, you are going to have a search warrant."

[fol. 34] Q. Did he ever show you a search warrant?

A. No, sir, he didn't. Didn't show me nothing only just a picture he had and stuck back in his pocket.

Q. Mr. Taylor, did you ever observe these inspectors in the vicinity of your home on other occasions?

A. Twice before.

Q. Twice before. I don't mean at your residence. I mean in the block there?

A. Did I ever see them?

Q. Did you ever see them?

A. Oh, yes. I have seen them go up and down the street several times.

Q. Ever see them go up to any other doors around there?

A. Yes, sir.

Q. How many?

A. I seen them go in one lady's house across the street. I don't know what her name is. I don't know the names of any of the neighbors around there. And I seen them try to get in several other people's houses, and the little girl next door, they come up there and done the same thing to her house that they done to mine. She wouldn't let them in, and they was ordered in court and she had a little baby, and so her husband he went down and they—

Q. Never mind what happened. Over what period of time have you seen these inspectors there within your block?

A. Oh, I have seen them drive up there. They parked there in front of the house a couple times.

[fol. 35] Q. Over what period of time?

A. Oh, three or four times that I can recollect that they was up in there. They was twice that they was around there. I don't know whether they ever came to the door or not, because I was getting ready to go away and I went on out. Whether they came to the house, I couldn't tell you.

Q. Have you ever had any complaints filed against your property by anyone where you had to appear down at the city offices and make corrections?

A. I have not. Nobody ever came to my house, no papers whatever.

Q. In your opinion, as a plumber for almost half a century, is your house in good condition, so far as plumbing is concerned?

A. Absolutely, yes.

Q. And so far as the electrical wiring is concerned?

A. Absolutely, yes.

Q. Is there any dirt or refuse or anything around your house that your would consider unsanitary?

A. No, sir.

Q. Does your house, in your opinion, meet all of the requirements that you and your wife find necessary to clean comfortable living at your residence?

A. Absolutely, yes.

Q. I notice the deed is in your wife's name?

A. Yes, sir.

Q. Did you pay any money toward the purchase of this property?

A. I did.

[fol. 36] Q. And can you tell me approximately how much?

A. Well, $2500.00 is what I put into the property.

Q. Mr. Taylor, can you tell his Honor whether or not these inspectors were there as a result of a door-to-door check of the premises in that vicinity?

A. Well, they had been going up and down there, door-to-door, looking through everybody's houses, yes, sir.

Q. Mr. Taylor, the criminal charges filed against you in the Municipal Court of the City of Dayton are still pending? I mean there has been no determination of that as yet, is that right?

A. That's right.

Q. And you have demanded a jury trial in the criminal case through myself as your attorney?

A. That's right.

Q. Have you had any wild parties down there, or drinking to excess?

A. Absolutely not. I'd get killed if I did.

Q. Any disturbances of any kind?

A. Absolutely not. I don't fight with nobody.

Q. Are you engaged in any kind of a business down there? I mean, do you run a store?

A. No, sir.

Q. Is this house just a dwelling?

A. That is my private home.

Q. Did you attempt to conceal from the inspectors anything at all?

A. No, sir.

fol. 37] Q. Did you attempt to flee from the inspectors?
A. No, sir. I don't run from nobody.
Q. Was the house up for sale?
A. No, sir.
Q. Did you have any intention of moving from there?
A. No, sir.
Q. This all happened in the City of Dayton, Ohio?
A. Yes, sir.
Q. Montgomery County, is that right?
A. That's right.

Cross examination.

By Mr. Duffy:

Q. Earl, can you tell the Court approximately the time of the day that these three inspectors called at your property?
A. It was about between ten and eleven o'clock.
Q. All three occasions?
A. Yes.
Q. I think you said they were there on three different occasions?
A. They came in the morning, yes.
Q. Between ten and eleven?
A. Between ten and eleven.
Q. Were they gentlemenly, well-behaved, did they attempt to force their way in or abuse you in any way?
A. No.
Q. Did I understand you, Earl, in answer to Mr. Eaton's questions, that you wouldn't object to plumbing inspectors [fol. 38] and electrical inspectors coming into your home?
A. Well, as I told him—this fellow called me on the telephone and asked me if they would come, the plumbing inspectors or electrical inspectors, could they come in. I said they could come in, "but you can't."
Q. You have no objection to a plumbing inspector coming into your home to inspect the plumbing.
A. I do not.
Q. You have no objection to an electrician coming in and inspect the electrical wiring?
A. I do not.

Q. Do you have any objection to a fire inspector coming in to inspect for fire danger?

A. No, sir.

Q. It is just the housing inspector that you are objecting to, is that right?

A. Yes, sir.

Q. Can you tell the Court why you would discriminate between the housing inspector and the other inspectors?

Mr. Eaton: I object to that.

The Court: He may answer.

Q. Can you tell the Court your reason, Earl, for differentiating between an electrical inspector, plumber and fireman from the housing inspectors?

A. Well, if you want me to tell you the truth, I'll tell you. I don't think that the men that they have got as inspectors are qualified for the position to go through a man's house and inspect anything, because they have never [fol. 39] worked at the business. They have never went and took any schooling, outside of what somebody else runs around and tells them, and I don't think them kind of men should be put on as inspectors, and to go into a man's house and try to inspect something that they don't know nothing about.

Q. Now, will you tell the Court, Earl, how many inspectors in the City of Dayton in the housing inspection division you know personally?

A. Well, I know the plumbing inspectors.

Q. No, I say in the housing inspection. You say the housing inspectors aren't qualified. Tell the Court how many of those men you know.

Mr. Eaton: I object. I think it is irrelevant.

Mr. Duffy: He said they aren't qualified. Certainly I think he should tell us how much he knows about them.

The Court: Well, we may be off on a tangent, I don't know, but the Court all through this will allow latitude both ways. I don't know whether that particular line of inquiry would be germane, but the Court will permit it, or he may ask an alternate question as to why he bases his answer as he does, what is the background. The Court will permit it.

Mr. Eaton: Note my exceptions.

Q. How many of the inspectors, Earl, do you know in the housing inspection?

A. Well, I know two or three of them, buf I can't tell you what their names are.

Q. You don't even know their names?

A. No; I have worked on jobs in places where these build-
[fol. 40] ing inspectors came in the buildings where we was working, and I couldn't tell you the names, only just what they would say they were the building inspectors.

Q. Now, the three inspectors that you refused to enter your house, did you know any of those three?

A. No, sir, I didn't.

Q. You don't know what their education is?

A. No, sir, I don't.

Q. You don't know what their training is?

A. Only just what they told me.

Q. Did they tell you what their education and training was?

A. They didn't tell me how much education, but they told me they hadn't been on this here inspection only just a few months.

Q. Did they tell you what they did before they came with the City?

A. No, they didn't.

Q. So that you don't know what their qualifications are, do you?

A. I don't know what they are qualified for nor nothing.

Q. Then do you want to change your answer you told the Court a minute ago that the reason you differentiate between the plumbing, electrician and the housing inspector was the housing inspectors didn't know what they were doing?

Mr. Eaton: I object to the form of the question, "do you want to change your" story.

The Court: That would be argumentative.

[fol. 41] Q. Do you still want the Court to believe that the housing inspectors do not know what they are doing?

A. Well, they can decide on that themselves. I ain't going to answer that question.

Q. Do you know, Mr. Taylor, how many of the housing inspectors are college graduates?

Mr. Eaton: I object.

A. I don't even know them.

The Court: The Court on that inquiry would sustain the objection.

Mr. Duffy: If the Court please, the man has said that he would permit the electrician, the plumber, the fireman to come in because they know what they are doing. He is objecting to the housing inspectors because they don't know what they are doing, yet he doesn't know the housing inspectors, he doesn't know their qualifications, doesn't know the training, he doesn't know the requirements to get a job with the City.

The Court: That is true, Mr. Duffy. However, we are in this issue concerned with a major issue, and that is as to the constitutionality of the ordinance as it applies in this particular case. I think that is possibly the chief issue we have here, and also a collateral one, I believe, that would be subject to this inquiry, and that is the charge as it applies to this gentleman. Now his personal reasons may throw us off our course a little bit. That is the only reason I am commenting at this time. In other words, this witness may have personal reasons why he doesn't [fol. 42] like the ordinance, which he has stated; however, those personal reasons may not affect one iota the real issue before the Court. I believe that is about as succinctly as I can state it.

Mr. Duffy: I have no further questions.

The Court: All right. Anything further, Mr. Eaton?

Mr. Eaton: Just one or two questions, your Honor.

Redirect examination.

By Mr. Eaton:

Q. Mr. Taylor, to your knowledge, has the case in the City court ever been set for trial before a jury?

A. I didn't get that.

Q. Has the case been set for trial before a jury in the Municipal Court that you know of personally?

A. No.

Mr. Eaton: I think that is all, your Honor. Are there any questions your Honor would like to ask Mr. Taylor?

The Court: No.

Mr. Eaton: Step down. That is all that we have to offer at this time, your Honor, and I do have,—(to Court Reporter)—you don't have to make a record of this.

The Court: Have you rested now?

Mr. Eaton: Yes.

The Court: Mr. Duffy, do you have anything further?

Mr. Duffy: No, we have nothing your Honor.

RESPONDENT'S EXHIBIT "A"

(See Opposite) ☞

Know all Men by these Presents:

That .....Walter Strong and Eva Strong.....
.....(husband and wife).....

in consideration of One Dollar ($1.00), and Other Valuable Considerations,

to ...them.... paid by .....Nina B. Taylor.....

the receipt whereof is hereby acknowledged, do ..hereby Grant, Bargain, Sell and Convey to the said .....Nina B. Taylor.....

....her.....heirs and assigns forever, the following real estate, situate in the City of Dayton, County of Montgomery, in the State of Ohio, and described as follows:

Being Lot numbered Two Thousand Five Hundred Forty-two (2542) of the revised and consecutive numbers of Lots on the Plat of said City of Dayton.

Subject to the same conditions and restrictions as to building, etc., as contained in all former deeds and effective at the time of this conveyance.

and all the Estate, Title and Interest of the said .....Walter Strong and Eva Strong.....

either in Law or in Equity, of, in and to the said premises; Together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; To Have and to Hold the same to the only proper use of the said .....Nina B. Taylor.....

....her.... heirs and assigns forever.

And the said .....Walter Strong and Eva Strong.....

for ....themselves.... and for ....their.... heirs, executors and administrators, do ... hereby Covenant with the said .....Nina B. Taylor.....

....her... heirs and assigns, that..they are.. the true and lawful owner s ... of the said premises, and ha ve full power to convey the same; that the title so conveyed, is Clear, Free and Unincumbered; and further that ...they... do... Warrant and Will Defend the same against the lawful claim or claims of all persons whomsoever. Excepting all taxes and assessments due and payable in December 1945 and thereafter, including any unpaid redistributed assessments, which the grantee herein assumes and agrees to pay as additional consideration.

In Witness Whereof, the said ..... Walter Strong and Eva Strong .....

have hereunto set their hands, this ..... day of ..... in the year of our Lord one thousand nine hundred and Forty five.

Signed and Acknowledged in presence of us

J. T. Blanton

Delores J. Hawk

Walter Strong

Eva Strong

The State of Ohio, County of Montgomery, ss:

BE IT REMEMBERED, That on the ..... day of ..... in the year of our Lord one thousand nine hundred and ..., before me, the subscriber, a Notary Public in and for said county, personally came .....

..... the grantor in the foregoing deed and acknowledged the signing thereof to be ..... voluntary act, for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto subscribed my name, and affixed my Notarial seal, on the day and year last aforesaid.

Delores J. Hawk
Notary Public in and for Montgomery County, Ohio

File No. 11671
Transferred 10-12-54
Received 10-12-54
Time 11:32 A.M.
Recorded 10-12-54
Fee $1.00
GEO. BRAUNSCHWEIGER
Montgomery County Recorder

RECORDER'S OFFICE

THE STATE OF OHIO
MONTGOMERY COUNTY } ss.

I, Charles S. Heck, Recorder of said County, do hereby certify that the foregoing is a true copy of

Deed

From Walter Strong et al

To Nina B. Taylor

Received on the 3rd day of Nov. 1945 at 11:34 o'clock A M

Recorded on the 3rd day of NOV 1945 in Book No. 1116

Page 404&5 of the Deed Records of Montgomery County, Ohio.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Dayton,

this 20th day of Dec. A D 1957

Charles S. Heck
Recorder, Montgomery County, Ohio

Per Paul D. Gilbert Dep.
Paul D Gilbert

[fol. 47]

RESPONDENT'S EXHIBIT "B"

Form J58—11-18-54—25M

THE DAYTON MUNICIPAL COURT
CRIMINAL DIVISION

No 5282

OFFICE OF THE PROSECUTOR

335 W. Third Street, 338 Safety Bldg.,

Dayton, O., March 12 A. D. 1957

Mrs. Nina B. Taylor

Respondent P2 ext B

130 Henry Street

Dayton, Ohio

You are hereby notified to appear at this office on the 19
day of March A. D. 1957, at 8:45 o'clock A.N.
to answer complaint made against you. by Housing Inspection,
City of Dayton;
refused entry.

William P. Keane

WILLIAM P. KEANE Prosecutor.

Bring This Notice Along

THE DAYTON MUNICIPAL COURT
CRIMINAL DIVISION

CERTIFIED COPY

OF

Deed

FROM

Walter Strong etal

TO

Nina B. Taylor

[fol. 46]

Form J58—11-18-54—2M

THE DAYTON MUNICIPAL COURT
CRIMINAL DIVISION

No. 5281 OFFICE OF THE PROSECUTOR

~~Rooms Room 2, City Building, 20 S. Jefferson St.~~
338 Safety Bldg., 335 W. Third Street

Dayton, O., March 12 A. D. 1957

~~Earl Tayler,~~
130 Henry Street
Dayton Ohio

You are hereby notified to appear at this office on the 19
day of March A. D. 195 7, at 8:45 o'clock A.M.
to answer complaint made against you. by Housing Inspection,
City of Dayton;
refused entry.

William P. Keane
WILLIAM P. KEANE Prosecutor.
THE DAYTON MUNICIPAL COURT
~~CRIMINAL~~ DIVISION

Bring This Notice Along

SECUTOR'S OFFICE.
ITY BUILDING
TON 2, OHIO

ty Bldg.,

CERTIFIED MAIL
No. [illegible]

Mrs. Nina B. Taylor

130 Henry Street,

Dayton 3 Ohio

Form J1 10-4-57 10M

THE STATE OF OHIO
Montgomery County
City of Dayton
ss.

DAYTON MUNICIPAL COURT

Before me, [illegible], Deputy Clerk of the Dayton Municipal Court, in the County of Montgomery and State of Ohio, aforesaid, personally came George Cooper, who being duly sworn according to law, deposeth and saith that on or about the 12 day of March A. D. 1957, in the City of Dayton, and in the County of Montgomery, and in the State of Ohio, did Earl Tayler being the owner of premises located at 130 Henry Street, did unlawfully refuse to permit a duly authorized agent of the Division of Housing Inspection of the City of Dayton, to enter and survey the said premises for the purpose of repairs or alteration as are necessary to comply with the provisions of minimum housing standards

Contrary to the form of the ordinances to-wit: Section 806.30 of Dayton, Ohio, in such cases made and provided and that said Earl Tayler is guilty of the fact charged, and further this deponent saith not.

Respondent's Exhibit C

George Cooper

ent 496

Sworn to and subscribed before me by the said George Cooper in the City of Dayton and County of Montgomery and State of Ohio, this 19 day of March A. D. 195 7

HENRY R. OTTO
Clerk of the Dayton Municipal Court

By [illegible] Deputy.

Case No. 163162

DAYTON MUNICIPAL COURT

PLEA: Guilty ☐ Not Guilty ☐

CONTINUED

CITY OF DAYTON

vs.

Earl Taylor-W

130 Henry St.

O.I. 3/26 9 A.M.

Affidavit and Warrant

Charge: Refusing Entry to City Housing Inspector.

DISPOSITION

Officers

Attorney

WARRANT

THE STATE OF OHIO

Montgomery County, City of Dayton

To the Chief of Police of the City of Dayton, Greeting: You are hereby commanded to take the body of the within named defendant and have the within named before the Honorable Judge of the Dayton Municipal Court forthwith, to answer unto the City of Dayton charged with Refusing Entry to Housing Inspt.

as charged in the affidavit hereto annexed, and of this writ make legal service and due return.

Given under my hand and seal of said Court this 19 day of March A. D. 195 7

HENRY R. OTTO
Clerk of the Dayton Municipal Court

By _____ Deputy

RETURN OF WARRANT

Mar. 20 195 7

On this date I served the defendant named in the foregoing Warrant.

_____ Police Officer, City of Dayton, Ohio

Comp. Notified

[fol. 52]

TAYLOR'S EXHIBIT "D"

HOUSING ORDINANCE

DEPARTMENT OF
SERVICE AND BUILDINGS
DIVISION OF BUILDING INSPECTION

HAROLD NIELSEN, Superintendent
LESLIE HITEMAN, Chief Housing Inspector

DAYTON, OHIO

1955

[fol. 53] AN ORDINANCE

Establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation; establishing minimum standards governing the conditions and maintenance of dwellings, dwelling units, rooming houses and rooming units; fixing certain responsibilities and duties of owners, operators and occupants of dwellings, dwelling units, rooming and boarding houses and rooming units; requiring permits for the operation of rooming and boarding houses and establishing fees therefor; establishing a Bureau of Housing Inspection and Slum Prevention in the Division of Building Inspection and establishing a Housing Appeals Board; fixing the powers and duties of the Housing Inspector for administration and enforcement of the ordinance; authorizing the adoption of rules and regulations by the Housing Inspector to carry out the provisions and purposes of the ordinance; authorizing the inspection of dwellings, the rehabilitation of dwellings and the vacation and removal of dwellings unfit for human habitation; and providing penalties.

WHEREAS, In the City of Dayton there are dwellings and rooming houses which are so dilapidated, unsafe, dangerous, unhygienic or insanitary as to constitute a hazard and menace to the health, safety, morals and welfare of the residents of such dwellings and rooming houses as well as of the people of the City of Dayton; now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

. . . . . .

[fol. 54] Section 806-30. ENTRY AND INSPECTION OF DWELLINGS.

(a) The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and [fol. 55] upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey.

(b) Every occupant of a dwelling shall give the owner thereof or his agent or employee access to any part of such dwelling or its premises at any reasonable hour for the purpose of making such repairs or alterations as are necessary to effect compliance with the provisions of this ordinance or any lawful order issued pursuant to the provisions of this ordinance.

(c) No officer, agent, or employee of the City of Dayton shall render himself personally liable for any damage that may accrue to persons or property as a result of any act required or permitted in the discharge of his duties under this ordinance. Any suit brought against any officer, agent, or employee of the City of Dayton as a result of any act required or permitted in the discharge of his duties under this ordinance shall be defended by the City Attorney until the final determination of the proceedings therein.

. . . . . .

[fol. 56]

Section 806-83. PENALTIES.

Any person who shall violate any provision of this ordinance shall, upon conviction, be punished by a fine of not less than twenty dollars ($20.00) nor more than two hundred ($200) or by imprisonment of not less than two (2) days nor more than thirty (30) days, or both, and each day of failure to comply with any such provision shall constitute a separate violation.

Passed by the Commission November 10, 1954.

Signed by the Mayor November 10, 1954.

HENRY S. STOUT
Mayor of the City of Dayton, Ohio

Attest:

OSCAR F. MAUCH, Clerk of the Commission

[fol. 57] And the foregoing is all of the evidence, testimony and exhibits introduced in the trial of this case.

Thereupon, upon the 10th day of June, 1957, judgment was entered in favor of the respondent; and

Thereupon, defendant gave notice of appeal upon questions of law on the 11th day of June, 1957, and the defendant filed this, his Bill of Exceptions with the Clerk of Common Pleas Court of Montgomery County, Ohio, as required by statute, on the 13th day of June, 1957, and the Clerk of Courts on the 14th day of June, 1957, forthwith notified Mr. Arthur T. Eaton, attorney for respondent, of the filing of said Bill of Exceptions, and ——— objections being filed to the same, the said Bill of Exceptions was by the Clerk of the Court of Common Pleas of Montgomery County, Ohio, transmitted to the trial Judge, the Honorable Don R. Thomas, for his signature on the 14th day of June, 1957, less than ten days but not more than fifteen days after the filing of the same with the Clerk of Courts by

said defendant, pltfs. attorney having consented to transmittal. And the defendant prayed the Court here to sign this, his Bill of Exceptions, and order the same to be made a part of the record in this case, but not spread upon the journal.

All of Which is done and ordered as prayed for this 14th day of June, 1957, and within the period provided by the statute.

Don R. Thomas, Trial Judge, Court of Common Pleas of Montgomery County, Ohio.

[fol. 58] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 60]

COURT OF APPEALS
SECOND APPELLATE DISTRICT

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

No. 2439

THE STATE OF OHIO, ex rel. Arthur T. Eaton,
Relator-Appellee,

—v.—

PAUL J. PRICE, Chief of Police, City of Dayton,
Respondent-Appellant.

OPINION—Rendered on the 2d day of November, 1957

Arthur T. Eaton, 707 Winters Bank Bldg., Dayton 2, Ohio, Attorney for Relator-Appellee.

Herbert S. Beane, City Attorney, Maurice J. Gilbert, Trial Counsel, Joseph P. Duffy, Asst. City Attorney, 204 Municipal Bldg., Dayton 2, Ohio, Attorneys for Respondent-Appellant.

WISEMAN, Judge:

This is an appeal on questions of law from the judgment of the Common Pleas Court of Montgomery County discharging relator from the custody of the respondent on a writ of habeas corpus.

The relator was arrested for unlawfully refusing "to [fol: 61] permit a duly authorized agent of the Division of Housing Inspection of the City of Dayton to enter and survey the said premises for the purpose of repairs or alterations as are necessary to comply with the provisions of minimum housing standards," contrary to Section 806.30 of Ordinance No. 18039 of the City of Dayton.

The relator's testimony being uncontradicted, there is no dispute as to the facts. The relator and his wife have lived for eleven years in the residence in question, the record title being in the name of the wife. The house is strictly a private residence, which at the time in question was in a good, clean, safe and sanitary condition. No complaint had been filed with respect to the condition of the premises. The inspectors had been inspecting other houses in the block. The inspectors called several times at the residence of relator and sought entrance for the purpose of inspection. Upon learning that the inspectors had no search warrant, the relator refused entrance. The arrest of the relator followed. After pleading "not guilty" the relator was incarcerated in the city jail in lieu of bond. He was released from jail by the common pleas court of Montgomery County on a writ of habeas corpus. Upon hearing he was discharged from custody, on the ground that the ordinance in question was unconstitutional and void, and that therefore the municipal court of Dayton had no jurisdiction.

Two errors are assigned: Error in passing on the constitutionality of the city ordinance in a habeas corpus proceeding; error in holding the inspection section (806-30) of [fol. 62] the ordinance to be violative of the Fourth Amendment to the Constitution of the United States and Article I, Section 14 of the Constitution of the State of Ohio.

There is a diversity of opinion on the question whether the constitutionality of an ordinance may be raised in a

habeas corpus proceeding. In Ohio the minority rule prevails, which is stated in Vol. 26, O. Jur. 2d, Sec. 13, page 566, as follows:

> "In Ohio, it is expressly held that a writ of habeas corpus will not lie to test the constitutionality of a statute or ordinance, in favor of one who has been convicted thereunder, where the criminal court in which the conviction was obtained had jurisdiction to determine the question of constitutionality; in such case the writ of habeas corpus cannot be made the substitute for an appeal." (Cases cited)

Also, a corollary to the above rule is stated on page 567, as follows:

> "Also, it has been held that the constitutionality of the statutes and ordinances may be passed upon where the petitioner is under arrest but has not been tried and convicted, and the same rule obtains where the applicant is held for appearance before the proper court upon preliminary hearing." (Cases cited)

The relator in the instant case has not been convicted. The matter is pending in the municipal court of Dayton on his plea of "not guilty." The rule urged by appellant has no application where there has been no conviction. This differentiation was not made in the case of State ex rel. Focke v. Kirkpatrick, 91 O. App., 131. We are required to follow the rule laid down by the Supreme Court in the cases [fol. 63] referred to in the footnote in Vol. 26, O. Jur. 2d, pages 566, 567. The first assignment of error is not well made.

Is the ordinance of the City of Dayton constitutional? The grant of powers of local self-government is conferred on municipalities by Article XVIII, Section 3, of the Ohio Constitution, which provides:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

It is not contended that the ordinance is in conflict with general laws. On the other hand, it is contended that the ordinance was enacted in pursuance of specific statutes. Section 715.26, R.C., in part provides:

"Any municipal corporation may:

(A) Regulate the erection of buildings and the sanitary condition thereof, the repair of, alteration in, and addition to buildings:

(B) Provide for the inspection of buildings or other structures and for the removal and repair of insecured (insecure) buildings;"

Section 715.29, R.C., provides:

"Any municipal corporation may:

(A) Regulate by ordinance the use, control, repair, and maintenance of buildings used for human occupancy or habitation, the number of occupants, and the mode and manner of occupancy, for the purpose of insuring the healthful, safe, and sanitary environment of the occupants thereof;

(B) Compel the owners of such buildings to alter, reconstruct, or modify them, or any room, store, compartment, or part thereof, for the purpose of insuring the healthful, safe, and sanitary environment of the occupants thereof;

[fol. 64] (C) Prohibit the use and occupancy of such buildings until such rules, regulations, and provisions have been complied with."

The purpose of ordinance No. 18099 is stated in the preamble as follows:

"Establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation: establishing minimum standards governing the conditions and maintenance of dwellings, dwelling units, rooming houses and rooming units;

fixing certain responsibilities and duties of owners, operators and occupants of dwellings, dwelling units, rooming and boarding houses and rooming units; requiring permits for the operation of rooming and boarding houses and establishing fees therefor; establishing a Bureau of Housing Inspection and establishing a Housing Appeals Board; fixing the power and duties of the Housing Inspector for administration and enforcement of the ordinance; authorizing the adoption of rules and regulations by the Housing Inspector to carry out the provisions and purposes of the ordinance; authorizing the inspection of dwellings, the rehabilitation of dwellings and the vacation and removal of dwellings unfit for human habitation; and providing penalties.

WHEREAS, in the City of Dayton there are dwellings and rooming houses which are so dilapidated, unsafe, dangerous, unhygienic or insanitary as to constitute a hazard and menace to the health, safety, morals and welfare of the residents of such dwellings and rooming houses as well as of the people of the City of Dayton; now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:"

Section 806-30 of said ordinance in part provides:

"(a) The Housing Inspector is hereby authorized and directed to make inspections to determine the condi- [fol. 65] tion of dwellings, dwelling units, rooming houses, rooming units and premises located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and

rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey."

Section 806.83 prescribes a penalty by way of fine or imprisonment for a violation of any provisions of the ordinance.

The relator refused on several occasions to permit housing inspectors to enter his home without a search warrant, although it is not disputed that the inspectors requested access at reasonable hours. Furthermore, it is conceded that no emergency existed.

Relator contends, and the lower court was in accord, that the ordinance exceeded the police power of the city by providing for inspection of a private dwelling against the will of the occupant and without a search warrant, and that the ordinance for that reason was in violation of the constitutional provisions in the Federal and State Constitutions which prohibit "unreasonable searches".

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, [fol. 66] houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment has no application to the states. State v. Lindway, 131 O. St.. 166, 2 N. E. (2d) 490. But the Ohio Constitution contains a similar provision. Section 14 of Article I of the Ohio Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported,

by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

The right of the individual to be secure in his property, unless good cause be shown to the contrary, very early found a place in the Anglo-Saxon law, which has been epitomized in the legal maxim—"Every man's house is his castle." The legal principle stated in this maxim is embodied in the above constitutional provision.

A new and controversial question is presented, which is: Does the constitutional provision against unreasonable search limit the City of Dayton in the exercise of the police power with regard to the right of inspectors to enter private dwellings without a search warrant and against the will of the occupant?

This is a case of first impression in Ohio. After a careful search only a few cases have been found in other juris- [fol. 67] dictions where the precise question presented here has been discussed or decided. In the District of Columbia v. Little, 178 F. 2d 13, 13 A. L. R. 2d, 954 (U. S. C. A. District of Columbia, 1949), the accused was convicted in the Municipal Court for the District of Columbia upon an information which charged that on certain premises on a certain day she hindered, obstructed and interfered with an inspector of the Health Department in the performance of his duty. A reversal of the conviction by the Municipal Court of Appeals was sustained on an appeal to the United States Court of Appeals for the District of Columbia. In that case the evidence shows that the inspector was ordered by the Health Officer to make an inspection of the premises after a complaint had been made "that there was an accumulation of loose and uncovered garbage and trash in the halls of said premises and that certain of the persons residing therein had failed to avail themselves of toilet facilities." It was not disputed that the premises was a private residence, the home of the accused; that the inspector had no search warrant; that the accused refused to unlock the door, and that she was thereupon arrested. Every legal question raised in the case at bar is discussed by the court in the Little case, either in the majority opinion or the dissenting opinion. The relator herein relies on the majority opinion

in that case, and the respondent on the dissenting opinion. Quoting from A. L. R. the court on page 958 states the question raised: Can a health officer of the District of Columbia inspect a private home without a warrant if the owner objects? We quote several paragraphs of the syllabus as follows:

[fol. 68] "1. Reasonable searches are, by implication, permitted by the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches and seizures.

"2. The reasonableness of a search without a warrant is adjudged solely by the extremity of the circumstances of the moment and not by any general characteristic of the officer or his mission.

"3. Except for the most urgent of necessities, the question of reasonableness of a search is for the magistrate and not for the enforcement officer.

* * * * * *

"6. The Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches is a precautionary statement of a lack of Federal governmental power as to a right already belonging to the people, coupled with a rigidly restricted permission to invade the existing right.

"7. The public importance of health laws and the beneficence and forbearance of health officers do not justify violation of the constitutional provision against unreasonable searches.

"8. A governmental official may not invade a private home without the authorization of a magistrate, in the absence of an immediate major crisis in the performance of duty affording neither time nor opportunity to apply to a magistrate.

* * * * * *

"10. 'Inspection' of a home by a health officer is a 'search' thereof within the meaning of the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches.

"11. Although the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches and seizures was intended to forestall the use of general warrants, the amendment was not intended as a protection against general warrants alone.

[fol. 69] "12. An act of Congress purporting to permit the invasion of homes by police officers without warrants, except under the established exception of unavoidable crisis, is void as in violation of the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches and seizures.

"13. Health officials may not, without a warrant and against the occupant's protest, invade a private home to investigate a complaint as to uncleanliness, the accumulation of garbage in the halls, and a failure of certain occupants to avail themselves of toilet facilities therein."

In the dissenting opinion Judge Holtzoff held:

age 964—"The Fourth Amendment does not ban all searches. It prohibits only those that are unreasonable."

age 965—"The Fourth Amendment was intended and is to be construed to apply only to criminal proceedings of a quasi-criminal nature for the enforcement of penalties." * * *

age 966—"It does not affect the administration of law if criminal prosecutions or suits for penalties are not involved. It does not apply to inspections, if no seizure is intended." * * *

age 966—"The conclusion that the prohibitions of the Fourth Amendment are limited to proceedings of a criminal or penal nature, is supported by the fact that apparently the Congress has never enacted any statutes providing for the issuance of search warrants for any purpose other than the enforcement of the criminal law. The inference is clear that the legislative branch of the

Government has continuously construed the Fourth Amendment in the manner here indicated. While this consideration is not conclusive, it is nevertheless entitled to great weight in interpreting the Constitution. Specifically, there is no existing statute under which a health inspector, a plumbing inspector, or a building inspector may obtain a warrant authorizing him to enter a building for the purpose of a routine inspection. It has always been assumed that no search warrant is necessary." * * *

[fol. 70] Page 967—"Moreover, even if an Act providing for such search warrants should be placed upon the statute books, how can an inspector make a showing of probable cause as a basis for the issuance of a warrant for the purpose of an ordinary, routine examination? Regular periodic inspections are conducted for the purpose of making certain that laws relating to sanitation and safety are being observed." * * *

Page 967—"If a search warrant were necessary for such recurring inspections, the requirement would amount to turning over the supervision of administration from the executive to the judicial branch of the Government, which as the Supreme Court has observed in the past, would be a source of mischief and is contrary to the philosophy of our form of Government. The Constitution contemplates a tripartite division of Government into three coordinate branches. It was not intended that the judicial branch should have supervisory control over the executive." * * *

Page 967—"There is no judicial document known to the law that would confer authority merely to inspect premises for the purpose of ascertaining whether certain laws, such as those relating to public health and public safety, are being observed. Such scrutiny has always been conducted by properly authorized officers without

> the requirement of judicial sanction. In effect, the opinion of the court proposes to create a new type of process, unknown to the common law or to any statute, and to confer power on the judiciary, that it has never possessed, to supervise the performance of routine administrative duties." • • •

The judgment in the Little case was affirmed by the Supreme Court of the United States in 339 U. S., I, 94 L. E. 599, 70 S. Ct., 468. However, the Supreme Court avoided passing on the constitutional question. The syllabus is as follows:

"1. Respondent's mere refusal to unlock the door on substantial constitutional grounds was not the kind of interference prohibited by the regulation.

[fol. 71] "2. The foregoing conclusion makes it unnecessary to decide whether the Fourth Amendment forbade the health officer to enter respondent's home without a search warrant."

The gist of the Court's ruling is found on page 5, as follows:

"The officer had no search warrant. While he was standing outside the door, respondent returned. She protested the right of the inspector to enter her private home, claiming that his entry would violate her constitutional rights. She neither used nor threatened force of any kind. In view of these facts found by the courts below, the question boils down to whether respondent's mere refusal to unlock the door accompanied by remonstrances on substantial constitutional grounds was the kind of interference prohibited by the regulation. We hold that it was not."

Mr. Justice Burton wrote a dissenting opinion in which Mr. Justice Reed concurred, as follows;

"If this Court is to interpret an ordinance of the District of Columbia, it seems to me that the action of the respondent was an effective interference with an in-

spector of the District Health Department in the performance of his official duties, and that such conduct of the respondent violated the ordinance that is before us. In my opinion, also, the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as is required by the Fourth Amendment to protect the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."

[fol. 72] In Givner v. State, 124 Atl. 2d, 764 (Court of Appeals of Maryland, 1956) the court held that provisions of a city code of Baltimore imposing a penalty upon the owner or occupier of any house or dwelling who refuses to permit the health commissioner or chief engineer of the fire department, or their authorized representatives, from entering premises for the purpose of inspecting the same during daylight hours, to determine whether the structure complied with the safety provisions of the code, are not unconstitutional as authorizing search without a warrant. We quote from several paragraphs of the syllabus as follows:

"Although Fourth Amendment of United States Constitution is not binding upon the states, in considering our own Constitution and statutes relating to the subject of unlawful searches and the admissibility of evidence thereby obtained, decisions of the United States Supreme Court on the similar Fourth Amendment are entitled to great respect.

"Attempted inspections by health commissioner, fire and building inspectors under ordinance authorizing their inspection of premises and imposing penalties upon owners or occupiers of such premises who refuse to permit their inspections was in exercise of police power.

* * * * *

"Municipal ordinances authorizing health, fire and building inspectors to enter upon premises during daylight hours, for the purpose of inspecting such premises to determine compliance with code provisions, and providing a penalty to the owner or occupier of premises who refuses to allow such inspections, were not unreasonable or unconstitutional as an authorization of an illegal search of the premises."

[fol. 73] In that case the building which the officer attempted to inspect was not a private dwelling but a three floor apartment house. In fact, the city ordinance excepted private residences from its operation. The building was defined in the ordinance as a "multiple dwelling". However, the court found that the defendant had expressly waived all defenses on technical grounds, including the defense that the ordinance excepted private dwellings from inspection. The Constitution of Maryland does not expressly provide against unreasonable searches and seizures. The court held that while the Fourth Amendment is not binding upon the states, due recognition would be given to decisions of the Supreme Court of the United States interpreting the Fourth Amendment. On the distinction between a search in a criminal case and in a civil matter, and whether the search is reasonable or unreasonable, the court on page 775 said:

"In the instant case, if despite the fact that the Fourth Amendment is not applicable, the tests of reasonableness which are applicable under it should be applied under either Maryland law or the Fourteenth Amendment, a search for evidence to prove guilt of a crime would present a situation which we should regard as substantially different from that presented by an inspection for the purpose of protecting the public health or safety. True, the privacy of the home of an individual is invaded whatever may be the reason for the search; but in the one case the liberty of the individual is at stake and in the other the health and safety of the public. The latter are the objectives of the inspection in the present case."

Again on page 775 the court said:

> "* * * we have the fact that these inspections are of a [fol. 74] routine nature, are to be made at reasonable hours and are primarily for protective, not punitive purposes. In these circumstances, we consider the proposed inspections reasonable, and in our opinion the case falls within one of the intermediate constitutional contentions stated in the Little case under which 'municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants.' We hold that such inspections are not unreasonable and hence are not unlawful."

The question presented here has been discussed from the viewpoint of the absence of a search warrant. It is interesting to note the statutory law in Ohio with respect to search warrants. Sections 2933.21 to 2933.31, inclusive, Revised Code. Section 2933.22, R.C., provides:

> "A warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly *describing the place to be searched and the property and things to be seized.*" (Emphasis ours)

What search warrants shall contain is set forth in Section 2933.24, R.C., which in part provides:

> "A warrant for search shall be directed to the proper officer, * * * and particularly describe the things to be searched for, the house or place to be searched, and the person to be seized. Such warrant shall command the officer to search such house or place for the property or other things, and to bring them, together with the person to be seized, before the judge or magistrate. * * *."

These statutory provisions are found under Title XXIX (29) Crimes—Procedure, and the provisions of the statutes [fol. 75] are directed solely to criminal matters and have no application whatever to civil matters. In the instant case, there could be no seizure of a person or things as

provided in the statute, and Section 14, Article I of the Ohio Constitution.

It will be observed that the constitutional provision prohibits "unreasonable searches". It is necessarily implied that there is no constitutional provision against reasonable searches.

However, in our opinion, the question presented should be determined on the basis of whether the ordinance is a valid or invalid exercise of the police power, rather than on the basis of whether a search warrant is or is not required.

The ordinance under consideration was enacted in pursuance to Section 715.26, R.C., above quoted, and, also, in pursuance to the police power conferred on municipalities by Article XVIII, Section 3 of the Ohio Constitution. Police power is constantly in the process of evolution and development and must be adapted to the conditions of the times.

In Vol. 10, O. Jur. 2d, Section 335, page 412, the breadth of the police power is stated as follows:

> "The police power includes anything which is reasonable, necessary, and appropriate to secure the peace, order, protection, safety, good health, comfort, quiet, morals, welfare, prosperity, convenience and best interests of the public."

In Section 336, page 415, it is stated:

> "It may be said in a general way that the police power extends to all of the great public needs. Being based [fol. 76] on the public safety, the public health and morals, and the general welfare, it is as broad as these conditions may require. The police power has been described as the law of necessity and as being co-extensive with the necessities of the case and the safeguards of public interest. The measure or dimensions of police power available to the government are the measure or dimensions of public need, whether they apply to health, safety, protection, or general welfare, except as qualified by state and Federal Constitutions.

"The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare."

In Section 338, on page 416, it is stated:

"The police power is not static and must ever be exercised in the light of changing conditions and the public needs. It is not circumscribed by fixed limits, but is capable of development and modification within certain limits, so that the powers of governmental control may be adequate to meet changing social, economic, and political conditions."

On page 445, in Section 369, it is stated:

"To be truly in the public welfare and thus superior to private property rights, legislation must confer upon the public benefits commensurate with its burden upon private property. The benefits to society, reasonably to be expected, must not be out of proportion to the restraint imposed and the detriment inflicted on citizens by such restraint."

The limitations on the police power are discussed in Section 356, pages 429, 430. On page 430 it is stated:

"* * * it is subject to particular limitations namely: (1) the purpose of the statute, ordinance, or regulation must fall within the scope of the police power; (2) the act must be reasonably designed to accomplish this purpose; and (3) must not be arbitrary, discriminatory, oppressive or otherwise unreasonable."

[fol. 77] In the application of these principles to the ordinance under consideration, we conclude that the ordinance falls within the scope of the police power, is reasonably designed to accomplish its purpose, and is not arbitrary, discriminatory or unreasonable.

The burden is on relator to show the unconstitutionality of the ordinance. In Vol. 10, O. Jur., 2d, Sec. 151, page 227, it is stated:

"* * * the burden of showing the unconstitutionality of a statute or ordinance is upon the one challenging its validity. The proof of unconstitutionality must be clear and beyond a reasonable doubt."

The rule with respect to the power of the courts to review a legislative determination as to whether there has been a proper exercise of the police power is stated in Vol. 10, O. Jur., 2d, Section 152, beginning at page 227, as follows:

"The courts have power to review a legislative determination as to what is a proper exercise of the police power but such review is limited and courts are inclined to defer to the judgment of the state or municipal legislative body to which the matter is committed in the first instance, and will not interfere unless it is clear that the statute or ordinance has no real or susbtantial relation to the public health, morals, safety, or welfare, or is unreasonable or arbitrary, and infringes rights secured by the fundamental law.

It belongs to the General Assembly or other legislative body clothed with the police power to determine primarily what measures are appropriate or needful for the promotion of the objects of the police power. When legislation has a real and substantial relation to the prevention of conditions detrimental to the public health, morals, or safety, no matter how unwise [fol. 78] the measure itself seems to individual judges, it is not for the judicial tribunals to nullify it upon constitutional grounds. If the legislation bears any reasonable relation to the public welfare and public morals the court may not declare it invalid. Unless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative discretion. Local authorities are presumed to be familiar with local conditions and to know the needs of the community. They are in a better position than the courts to judge the public need and must be allowed a considerable latitude of discretion."

Inspections conducted by the health department of the state or a municipality have been accepted as a valid exercise of the police power and have not been considered an invasion of the constitutional rights of the occupant of the building inspected. Vol. 26, O. Jur., 2d, Sec. 42, page 713.

After giving due consideration to the rulings in the cited cases and the applicable principles of law, we are of the opinion that in the instant case the inspection is a routine matter; it is to be made during reasonable hours and is primarily for protection and not punitive purposes, and in the interest of the general welfare. The inspection contemplated by the ordinance is not an "unreasonable search" within the meaning of the provision prohibiting "unreasonable searches and seizures" in Section 14 of Article I of the Ohio Constitution. The provision with respect to inspection is a vaild exercise of the police power and does [fol. 79] not violate the constitutional rights of the relator.

Judgment reversed and cause remanded.

Hornbeck, P.J., concurring.
Crawford, J., dissents.

CRAWFORD, Judge, dissenting:

Those who framed the Fou th Amendment to the Constitution of the United States and those who adopted it almost verbatim in Section 14 of Article I of the Constitution of Ohio could hardly have intended to protect only those suspected of crime by requiring a warrant, while the ordinary citizen might still be compelled, at the risk of fine and imprisonment, to open his private dwelling at any hour of the day or night which a municipal housing inspector without a warrant might decide was "reasonable."

> " * * * To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."
>
> District of Columbia v. Little 178 Fed. 2d, 13 (17).

> "There is no doctrine that search for garbage is reasonable, while search for arms, stolen goods or gambling equipment is not." ibid. 16

[fol. 80] Section 14 of Article 1 of the Constitution of Ohio, like the Fourth Amendment to the Federal Constitution, contains two separate and distinct clauses:

> "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

The first clause creates nothing new. It preserves an existing fundamental right. The second clause limits and circumscribes the one recognized exception to that right. The privilege claimed by the city would destroy the right, and nullify the first clause.

There can be no serious doubt that the true purpose of these constitutional provisions was not to shield the actual or suspected felon, but to keep inviolate the sacred right described at the beginning, "The right of the people to be secure in their persons, houses, etc." Any exception should be strictly construed. 10 O. Jur. 2d, 138, Constitutional Law, Sec. 317.

> "* * * to say that the specific prohibition of one threatened violation of a basic right thereby validates every other violation of that right is both illogical and unrealistic."
>
> District of Columbia v. Little 178 F. 2d, 13 (19)

While the word "inspection" as used in the ordinance is perhaps broader and potentially more objectionable than the word "search" as found in the Constitution, we need not indulge in fine distinctions, inasmuch as interpretation should always be liberal in favor of the citizen. 10 O. Jur., [fol. 81] 2d, 137, Constitutional Law, Sec. 37.

It is complained that the requirement of a search warrant would be inconvenient and impractical for the purposes of housing inspection. The Constitution has often been found inconvenient. But if a search warrant is the

only constitutional method provided whereby the city might pursue its purpose, it must either procure one upon demand or forego the "inspection." Relator was, therefore, entirely within his rights to refuse admittance to one without a warrant.

Lack of statutory authority for a search warrant for such an inspection certainly does not justify proceeding without one.

> "It is untenable to argue that because Congress has failed to provide procedure for obtaining a search warrant, searches otherwise unconstitutional can therefore be made."
>
> District of Columbia v. Little 178 Fed. 2d, 13 (20)

It is possible that the right in question may be subject to further definition and even to some reasonable limitation in the public interest, but if so, this can properly be accomplished only by the careful and regular processes of legislation and adjudication, and must not be entrusted to the personal views of an inspector.

In District of Columbia v. Little, 178 Fed. 2d, 13 (16) it is said:

> "* * * except for the most urgent of necessities, the question of reasonableness is for a magistrate and not for the enforcement officer."

Under the present provisions of this ordinance the citizen must act at his peril. Either he must keep the doors of [fol. 82] his dwelling open during all hours that the inspector thinks are reasonable or he must risk fine and imprisonment if his own judgment of the matter is in error. It is small comfort that in his trial as an accused defendant the court will then have a belated opportunity to pass upon the question and decide whether his conduct has been criminal.

Extensive as is the police power, and elastic as it must be to serve our developing economy, it is not absolute or unlimited. Measures enacted under it must still be reasonable, not only in their substantive provisions, but also in the means provided for their administration and enforce-

ment. 10 O. Jur. 2d, 454, 455, Constitutional Law, Secs. 376, 377.

And they must not needlessly infringe private rights. 10 O. Jur. 2d, 446, Constitutional Law, Sec. 371.

It is conceded that the question before us is new and controversial. The very lack of authority on the point is mute but eloquent testimony that not until recently have municipalities presumed to enter private dwellings in the manner and for the purpose here involved.

The case of Richards v. City of Columbia, 88 S. E. 2d, 683, furnishes no precedent, for the court there observed:

> "The question is not presented because there has been no entrance of any premises by the director over the objection of the occupant."

In Givner v. State of Maryland, 124 Atl. 2d, 764, the right of entry was upheld, but in the absence of any comparable constitutional provision. And that court expressed doubt that the provisions of the Fourth Amendment against [fol. 83] unreasonable searches and seizures could be regarded as limited to criminal prosecutions.

The only direct and authoritative decision on the question, that in District of Columbia v. Little, 178 Fed. 2d, 13, in the Court of Appeals for the District of Columbia, stands unreversed. It was affirmed by the United States Supreme Court on other grounds. 399 U. S., 1. Hence we cannot know whether a majority of the Supreme Court was inclined to agree or disagree with the court below on the constitutional question. But they did two significant things: They commented upon the grave importance of the question, and they declined to reverse.

The telling language of the majority of the Court of Appeals in the Little case seems grounded upon compelling logic.

That court also suggested that appropriate legislation might be devised to provide an adequate and appropriate method of inspection in the public interest without violating the rights of the individual citizen.

I apprehend that whenever a real public need is made apparent there will be few objectors, and that if those few were accorded a hearing with at least ultimate resort

to the courts, no vital program would be seriously impeded, the most objectionable features of the ordinance would be removed, and even conflict with the Constitution might possibly be avoided.

But the burden now imposed by the ordinance upon the householder violates his constitutional right to be secure in his house; and its sweeping provisions for inspection exceed the police power of the municipality. For this two-[fol. 84] fold reason the inspection and penal provisions of the ordinance are in my opinion unconstitutional and invalid.

The judgment of the trial court should be affirmed.

[fol. 85]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

Case No. 2439 C. A.

STATE OF OHIO, ex rel. ARTHUR T. EATON,
Relator-Appellee,

— vs —

PAUL J. PRICE, etc., Respondent-Appellant.

ENTRY OF JUDGMENT—December 13, 1957

This matter came on to be heard as an appeal on questions of law from a judgment of the Court of Common Pleas ordering the discharge of Earl Taylor from the custody of the respondent Chief of Police, and the same was duly submitted.

The Court finds that Section 806-30 of the Housing Code of the City of Dayton, as enacted by Ordinance No. 18099, is in all respects reasonable and valid and within the police power of the City of Dayton; that the inspection provisions of said ordinance as enacted by Section 806-30 of the Code of General Ordinances of the City of Dayton are not violative of the Fourth Amendment to the Constitution of the United States nor of Section 14 of Article I of the Constitution of Ohio, forbidding unreasonable searches and seizures, and that accordingly the judgment of the Court

below in so holding was in error, is contrary to law, and should be reversed.

[fol. 86] It is accordingly Ordered and Adjudged that the said judgment of the Court of Common Pleas be and the same hereby is reversed, and that a mandate issue to the Clerk of the Court of Common Pleas to carry this judgment into execution. Exceptions of the relator are hereby noted and costs awarded to the respondent.

Approved: Roscoe G. Hornbeck, Presiding Judge; William C. Wiseman, Judge.

Arthur T. Eaton, Attorney for Relator-Appellee.

Herbert S. Beane, City Attorney; M. J. Gilbert, Trial Counsel; Joseph P. Duffy, Asst. City Attorney, Attorneys for Respondent-Appellant.

[fol. 89] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 92]

IN THE SUPREME COURT OF OHIO
January Term, 1958

Case No. 35488

Title of Case

THE STATE OF OHIO, ex rel. ARTHUR T. EATON, Appellant,

—v.—

PAUL J. PRICE, Chief of Police, City of Dayton, Appellee.

Action

Appeal from the Court of Appeals of Montgomery County.

Motion for an order Directing the Court of Appeals of Montgomery County to certify its record.

Appeal from the Court of Appeals of Montgomery County.

Attorneys

Arthur T. Eaton, 707 Winters Bank Bldg., Dayton, Ohio.
Kenneth B. Johnston, 50 W. Broad St., Columbus, Ohio.

Herbert S. Beane, Maurice J. Gilbert, Joseph P. Duffy, 204 Municipal Bldg., Dayton, Ohio.

MEMORANDA OF PLEADINGS, &C., FILED, WRITS ISSUED, &C., JUDGMENTS, ORDERS AND DECREES

Date	
Dec. 31, 1957	Notice of appeal, motion for an order to certify record and proof of service filed.
Dec. 31, 1957	Court of Appeals transcript, Original Papers and Bill of Exceptions filed.
Jan. 7, 1958	Entry extending time for filing appellant's brief to January 20, 1958, Carl V. Weygandt, Chief Justice, Journal 42, page 474.
Jan. 17, 1958	Assignments of Error, Appellants non-printed brief and proof of service filed.
Jan. 17, 1958	Motion by appellant to make testimony of Oscar F. Mauch part of the Bill of Exceptions filed.
Jan. 25, 1958	Appellees non printed brief filed.
Feb. 3, 1958	14 additional copies of motion to make testimony of Oscar F. Mauch part of Bill of Exceptions filed.

[fol. 93]

Mar. 5, 1958	Motion for an order directing the Court of Appeals of Montgomery County to certify its record—Allowed. Journal 42, page 518.
Mar. 5, 1958	Order #3233 issued to Clerk of Courts to certify record.
Mar. 5, 1958	Motion by appellant to make testimony of Oscar F. Mauch part of the Bill of Exceptions—Overruled. Journal 42, page 518.
Mar. 7, 1958	Court of Appeals certificate #2439 filed.
Mar. 11, 1958	Assignments of Error, Appellants Non-printed brief and proof of service filed.
Mar. 11, 1958	Appellee's non-printed brief refiled and proof of service filed.

Date	
Mar. 11, 1958	Cause docketed on its merits.
Mar. 13, 1958	4 additional copies of appellees brief filed.
Mar. 29, 1958	2 additional copies of appellants brief filed.
Apr. 4, 1958	Application to dispense with printing record filed.
Apr. 7, 1958	Entry granting application to dispense with printing record. Carl V. Weygandt, Chief Justice, Journal 42, page 542.
May 12, 1958	Amicus Curiae brief on behalf of Ohio Civil Liberties Union filed.
May 12, 1958	Entry granting Daniel G. MacLeod leave to file brief amicus curiae on behalf of Ohio Civil Liberties Union. Carl V. Weygandt, Chief Justice, Journal 42, page 571.
Jun. 18, 1958	Judgment affirmed. Journal 42, page 605.
Jun. 25, 1958	Mandate issued. (HELD)
Jun. 25, 1958	Notified application for rehearing to be filed.
Jul. 1, 1958	Application for rehearing and proof of service filed.
Oct. 8, 1958	Rehearing denied. Journal 42, page 665.
Oct. 15, 1958	MANDATE ISSUED. Original Papers and Bill of Exceptions sent to Clerk.
Jan. 2, 1959	Notice of Appeal, proof of service and praecipe for transcript of record filed.
Jan. 6, 1959	Second Notice of appeal and proof of service filed.

[fol. 94]

JOURNAL ENTRIES

Journal 42, Page 474
Entry

By leave of court, the Relator-Appellant is hereby given until January 20, 1958 to file relator-appellant's brief. Carl V. Weygandt, Chief Justice.

Journal 42, Page 518
Motion for an Order Directing the Court of Appeals of Montgomery County to Certify Its Record.

It is ordered by the Court that this motion be, and the same hereby is, allowed.

Journal 42, Page 518
Motion by Appellant to Make Testimony of Oscar F. Mauch Part of the Bill of Exceptions. Montgomery County.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

Journal 42, Page 542
Entry

This cause came on to be heard on the Motion of the Relator-appellant to dispense with the printing and filing of the Record herein, and it appearing to the Court that such Motion is well taken, does hereby sustain same and does hereby order that the printing and filing of the Record be dispensed with in this action. Carl V. Weygandt, Chief Justice

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Journal 42, Page 571
Entry

Upon application and for good cause shown, it is ordered that Daniel G. MacLeod is hereby given leave to file brief amicus curiae herein on behalf of Ohio Civil Liberties Union. Carl V. Weygandt, Chief Justice

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[fol. 95] Journal 42, Page 605
Appeal From the Court of Appeals of Montgomery County

JUDGMENT—June 18, 1958

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Montgomery County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby af-

firmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein,

It is further ordered that the appellee recover from the appellant his costs herein expended taxed at $.....

Ordered, That a special mandate be sent to the Court of Common Pleas of Montgomery County, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals, of Montgomery County, "for entry."

Journal 42, Page 665
Application for Rehearing

REHEARING DENIED—October 8, 1958

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

[fol. 101a]

IN THE SUPREME COURT OF THE STATE OF OHIO

(168 Ohio St. 123.)

1. Under the authority granted by Sections 715.26 and 715.29, Revised Code, a municipal corporation may "provide for the inspection of buildings or other structures and for the removal and repair of insecured buildings," and "regulate by ordinance the use, control, repair, and maintenance of buildings used for human occupancy or habitation," and "compel the owners of such buildings to alter, reconstruct, or modify them * * * for the purpose of insuring the healthful, safe, and sanitary environment of the occupants thereof," and "prohibit the use and occupancy of such buildings until such rules, regulations, and provisions have been complied with."

2. An ordinance establishing minimum standards "governing utilities, facilities and other physical things and

conditions essential to make dwellings safe, sanitary and fit for human habitation," and "governing the conditions and maintenance of dwellings," and containing a provision which authorizes a housing inspector to make inspections of "dwellings, dwelling units, rooming houses, rooming units and premises located within [fol. 101b] the city" and which also authorizes such inspector "upon showing appropriate identification * * * to enter, examine and survey at any reasonable hour all dwellings" and which requires that the "owner or occupant of every dwelling" shall give such inspector "free access to such dwelling * * * at any reasonable hour for the purpose of such inspection, examination and survey," with penalties of fine or imprisonment or both for violation of such provision, is not violative of Section 14 of Article I of the Ohio Constitution prohibiting unreasonable searches and seizures.

OPINION—Decided June 18, 1958.

Appeal from the Court of Appeals for Montgomery County.

On March 20, 1957, one Earl Taylor was served by a police officer with an instrument, captioned "Affidavit and Warrant," issued out of the Dayton Municipal Court. The affidavit, sworn to and signed by one George Cooper on March 19, states that "on or about the 12 day of March A. D. 1957 * * * Earl Taylor being the owner of premises located at 130 Henry Street, did unlawfully refuse to permit a duly authorized agent of the Division of Housing Inspection of the City of Dayton, to enter and survey the said premises for the purposes of repairs or alteration as are necessary to comply with the provisions of minimum housing standards contrary to the form of the ordinances to wit: Section 806.30 of Dayton, Ohio. * * *."

It appears from the record that Taylor had previously received a notice from the office of the Prosecutor in the criminal division of the Dayton Municipal Court, dated March 12, notifying him to appear at that office on March 19, 1957, to answer a complaint made against him for refusing entry for housing inspection, to which notice Taylor did not respond.

[fol. 101c] When served with the affidavit and warrant he was not physically placed under arrest but was ordered to appear in Municipal Court on March 26. On that day he appeared in court, entered a plea of not guilty and, bond having been fixed in the sum of $1,000, was placed in the city jail. Late in the afternoon of the same day a writ of habeas corpus was sought in the Common Pleas Court of Montgomery County against the Chief of Police of Dayton on the application of Arthur T. Eaton to produce the body of Taylor, at which time he was released on his own recognizance by order of the court, and the matter was set for hearing on April 8.

Following the hearing, the writ was allowed on May 26, 1957, and Taylor was discharged from custody, the court finding in its entry that "Section 806.30 of the Code of General Ordinances of the City of Dayton, Ohio, being ordinance No. 18099 * * * is unconstitutional as it applies to the facts in this case as violative of the Fourth Amendment to the Constitution of the United States and Article I, Section 14 of the Constitution of the State of Ohio."

An appeal on questions of law was taken by the City Attorney of Dayton, representing the Chief of Police, from the judgment of the Common Pleas Court to the Court of Appeals, which court, with one judge dissenting, reversed the judgment of the trial court and remanded the cause.

It is now before this court on an appeal as of right and upon the allowance of a motion to certify. Further facts as required are stated in the opinion.

HERBERT, *J.* In the case of *State, ex rel. Smilack, v. Bushong, Supt.*, 93 Ohio App., 201, 112 N. E. (2d), 675 (affirmed by this court in 159 Ohio St., 259, 111 N. E. [2], 918), Guernsey, *J.*, stated at the outset of the opinion:

> [fol. 101d] "The cause is incorrectly captioned as it is not brought upon the relation of the state of Ohio and should be captioned 'In the Matter of the Petition for a Writ of Habeas Corpus by Oscar Smilack.'"

Although not pertinent to the issue here, we certainly approve of the principle embodied in the foregoing quoted statement. The incorrectness of the caption in the *Smilack* case is further compounded here in that Taylor's attorney,

Eaton, is designated as relator. However, reference hereinafter to the relator will be intended to mean Taylor and not Eaton.

Condensing the assignments of error, relator contends that Section 806-30 of the Code of General Ordinances of the City of Dayton, being a part of ordinance No. 18099, is violative of the Fourth Amendment to the Constitution of the United States and of Section 14 of Article I of the Ohio Constitution. The question of whether this ordinance—or, for that matter, any statute of the state of Ohio—is violative of the Fourth Amendment of the Constitution of the United States is settled and disposed of in the first paragraph of the syllabus in the case of *State v. Lindway*, 131 Ohio St., 166, 2 N. E. (2d), 490, which states:

> "1. The Fourth and Fifth Amendments to the Constitution of the United States, prohibiting unreasonable searches and seizures and compulsory self-incrimination, are directed exclusively against the activities of the federal government and have no application to the various states and their agencies."

Section 14 of Article I of the Ohio Constitution is almost the same verbatim as the federal constitutional provision and states:

> "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; [fol. 101e] and no warrant shall issue, but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

Section 806-30, which the relator is charged with violating, provides in part:

> "The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the city of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of

dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey."

Section 806-83 fixes a penalty of a fine of not more than 200 dollars or imprisonment for not more than 30 days, or both, for the violation of any provision of ordinance No. 18099. This ordinance, of which these sections are a part, was passed in November 1954. The caption states:

"An ordinance establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation; establishing minimum standards governing the conditions and maintenance [fol. 101f] of dwellings * * *; fixing certain responsibilities and duties of owners, operators and occupants of dwellings * * *; establishing a Bureau of Housing Inspection and Slum Prevention in the Division of Building Inspection and establishing a Housing Appeals Board; fixing the powers and duties of the Housing Inspector for administration and enforcement of the ordinance * * *; authorizing the inspection of dwellings, the rehabilitation of dwellings and the vacation and removal of dwellings unfit for human habitation; and providing penalties."

The preamble states:

"Whereas, in the city of Dayton, there are dwellings and rooming houses which are so dilapidated, unsafe, dangerous, unhygienic or insanitary as to constitute a hazard and menace to the health, safety,

morals and welfare of the residents of such dwelling and rooming houses as well as of the people of the city of Dayton * * *."

By the ordinance, Sections 806-27 to 806-83, both inclusive, were added to the Code of General Ordinances of the City of Dayton. In Section 806-28 the Bureau of Housing Inspection and Slum Prevention in the Division of Building Inspection was created under the supervision of a Chief Housing Inspector.

Section 806-31 provides:

"Whenever the Housing Inspector determines that there has been a violation of any provision of this ordinance he shall give notice of such violation to the persons or persons responsible therefor and order compliance with the ordinance, as hereinafter provided. Such notice and order shall:

"(a) Be put in writing on an appropriate form;

"(b) Include a list of violations, refer to the section or sections of the ordinance violated and order [fol. 101g] remedial action which, if taken, will affect compliance with the provisions of this ordinance;

"(c) Specify a reasonable time for performance;

"(d) Advise the owner, operator or occupant of the procedure for appeal;

"(e) Be served upon the owner, occupant or agent in person provided, however, that such notice and order shall be deemed to be properly served upon such owner, occupant, or agent if a copy thereof is sent by registered mail to his last known address and a copy is posted in a conspicuous place in or on the dwelling affected."

Section 806-32 provides for an appeal from any notice and order given under the provisions of the preceding section to the Housing Appeals Board, created under Section 806-33, by filing a written petition with such board within ten days after receipt of the notice and order appealed from, and for a hearing thereon.

Section 806-32 further provides:

"(b) After a hearing, the Housing Appeals Board shall sustain, modify or withdraw the notice and order by majority vote, depending upon its findings as to whether the provisions of this ordinance have been complied with, and the petitioner and the Housing Inspector shall be notified in writing of such findings.

"* * *

"(d) The proceedings at such hearings, including the findings and decision of the Housing Appeals Board and reasons therefor shall be summarized and reduced to writing and entered as a matter of public record in the office of the Housing Inspector. Such record shall also include a copy of every notice and order issued in connection with the matter."

[fol. 101h] Because of the importance of the constitutional question here and its apparent novelty so far as Ohio is concerned, these pertinent provisions are set forth at length in order to present a complete picture of the steps provided for in housing inspections under the ordinance. Subsequent provisions deal in detail with requirements as to sanitary units, electrical outlets and fixtures, minimum heating facilities, floor space of dwelling units, and other related matters not involved here.

With respect to Section 806-30, it was testified by Taylor in the Common Pleas Court that inspectors came to his home on three occasions, each time at a reasonable hour, and that he denied them admission on each occasion. The relator has been a plumber for many years and showed in his testimony that he was familiar with plumbing and electrical inspections. Illustrative of his testimony is the following excerpt:

"Q. Did they have a search warrant? A. No, sir, they didn't. * * * Then the second time the fellow came out he entered the same way, came up like that, and then he called me on the telephone, wanted to know if he could come to my house and inspect the inside of the house. I said, 'Who are you, anyway?'

He said, 'I am the building inspector,' or, the housing inspector, and I said, 'Well, I don't see what right that you got coming into my house. Until you show me in writing, or some kind of facts, that you got a right to come into my house and inspect the house, I will not let you in.' And I said, 'Furthermore, I know the building inspectors and I know the plumbing inspectors, the electric inspectors and all the rest of them.' I said 'I work at this business and I come in contact with them off and on, and as far as you coming in,' I said 'You can't come in.' * * *

"* * *

[fol. 101i] "* * * A. The last time they was there a colored fellow and a white fellow, they came up to [illegible] door, and I walked out there, and he said, 'Mr. [illegible]vlor?' I said, 'Yes, sir.' He showed, like a picture, he had a picture on a piece of paper, he held it in his hand and stuck it back in his pocket. He said the housing inspector wanted to inspect 'your house.' I said, 'What do you have in there that you want to inspect?' I said, 'I have nothing in my house for inspection.' He said, 'We have a right to come in your house, go through your house, inspect the whole inside of your house.' I said, 'You have nothing wrote down on paper. You don't have a thing to show me you are going to come in there to inspect anything, and as far as that goes you aren't coming in unless you have a search warrant to get in.'

"Q. Did he have a search warrant? A. No, sir.

"Q. Did he ever come back with a search warrant? A. No, sir. And, furthermore, he said, 'If you ain't going to let us in, we are entitled to get in, and if you don't let us in' he said, 'I am going to leave it up to the Prosecutor.' I turned around and said, 'I don't care what you do. You aren't coming in.' He walked over and got in his car and that was the end of it."

Section 3 of Article XVIII of the Ohio Constitution authorizes municipalities "to adopt and enforce within their limits such local police, sanitary and other similar regula-

ions, as are not in conflict with general laws." Under the uthority granted by Sections 715.26 and 715.29, Revised 'ode, a municipal corporation may "provide for the inpection of buildings or other structures and for the reioval and repair of insecured buildings," and "regulate y ordinance the use, control, repair, and maintenance of uildings used for human occupancy or habitation," and compel the owners of such buildings to alter, reconstruct, r modify them * * * for the purpose of insuring the fol. 101j] healthful, safe, and sanitary environment of he occupants thereof," and "prohibit the use and occupancy f such buildings until such rules, regulations and proisions have been complied with."

It is not contended that the ordinance under considerain here is in conflict with any statutory enactment. The ssue raised is that the city of Dayton, in the exercise of his police power, has violated the constitutional provision gainsf unreasonable search and seizure.

Many decisions and able opinions have been written durng the last two centuries covering this general subject f search and seizure, even going back into early English ases, but there is a paucity of authorities covering the precise point raised here. It seems to have been taken for granted throughout the United States that inspections of uildings, including dwellings, under reasonable regulaions did not constitute "unreasonable search and seizure" n the constitutional sense, until the case of *District of Columbia v. Little*, 178 F. (2d), 13, 13 A. L. R. (2d), 954, vas decided in 1949 by the United States Court of Appeals for the District of Columbia. In that case the court, by a two to one decision, held that an inspector of the Health Department of the District of Columbia was not entitled o enter the home of Little to make an inspection over her protest and without a warrant. In the opinion, Prettyman, J., set forth the facts and pertinent regulation of the District. The regulation read in part:

> "(2) It shall be the duty of every person occupying any premises * * * to keep such premises or part, * * * clean and wholesome. If upon inspection by the Health Officer or an inspector of the Health Department, it be determined that any such part thereof

> * * * is not in such condition as herein required, the occupant * * * of such premises or part, or the owner [fol. 101k] thereof * * * shall be notified and required to place same in a clean and wholesome condition; and in case any person shall fail or neglect to place said premises or part in such condition within the time allowed by said notice, he shall be liable to the penalties hereinafter provided.
>
> "* * * *
>
> "(10) That the Health Officer shall examine or cause to be examined any building supposed or reported to be in an unsanitary condition, and make a record of such examination * * *
>
> "* * * *
>
> "(12) That any person violating, or aiding or abetting in violating, any of the provisions of these regulations, or interfering with or preventing any inspection authorized thereby, shall be deemed guilty of a misdemeanor, and shall, upon conviction * * *."

The looseness and vagueness of the District of Columbia regulation should be noted as compared with the provisions of the Dayton ordinance quoted herein.

With all due respect for the majority opinion in the *Little* case, this Court is persuaded more by the reasoning set forth in the dissenting opinion by Holtzoff, J. When that case was appealed to the Supreme Court of the United States, Mr. Justice Black rendered the opinion of the court in 339 U. S., 1, 94 L. Ed., 599, 70 S. Ct., 468. The opinion states (at page 3):

> "Neither the facts of this case, nor the District law on which the prosecution rests, provide a basis for a sweeping determination of the Fourth Amendment's application to all these varied types of investigations, inspections and searches. Yet a decision of the constitutional requirement for a search in this particular case might have far-reaching and unexpected implications as to closely related questions not now before us. [fol. 101l] This is therefore an appropriate case in

which to apply our sound general policy against deciding constitutional questions if the record permits final disposition of a cause on nonconstitutional grounds. See *Rescue Army v. Municipal Court*, 331 U. S., 549, 568-575, and cases there cited. Applying this policy, we find it unnecessary to decide whether the Fourth Amendment required a search warrant here. For even if the Health Officer had a lawful right to inspect the premises without a warrant, we are persuaded that respondent's statements to the officer were not an 'interference' that made her guilty of a misdemeanor under the controlling District law."

Mr. Justice Burton, with whom Mr. Justice Reed concurred, wrote a cogent dissenting opinion in which he stated:

"In my opinion, also, the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as is required by the Fourth Amendment to protect the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."

We do not have, therefore, a decision of the United States Supreme Court as to whether in federal jurisdictions a housing inspection may lawfully be made without a search warrant, if such is demanded.

The topic of municipal housing codes has recently been considered in several law review articles. The following is from 69 Harvard Law Review (1956), 1115:

" * * * Traditionally, cities have regulated area use patterns through zoning ordinances, have set stand-
[fol. 101m] ards for new construction and installations in building, plumbing, and electrical codes, and have required safety features in buildings used by the public. However, since World War II at least 50 cities,

generally under the authority of city charters or state enabling legislation, have adopted housing codes designed for comprehensive and effective regulation of occupancy and facilities in existing housing. The enactment of new housing codes has been encouraged by provisions in Title III of the federal Housing Act of 1954, under which federal aid for local slum clearance projects is conditioned on the existence in the locality of 'a workable program' for the prevention and elimination of slums. * * * "

(Page 1125): "The power of the inspector to examine private homes for possible violations which may result in imposition of criminal penalties has raised the question whether he may demand entry without presentation of a court order. Although some codes require the inspector to obtain a court order if he is denied access (Footnote—see *e. g.* Denver, Colorado Housing Code Ordinance No. 27, Section 8-1944), many codes apparently require occupants to admit inspectors without a warrant. However, in *District of Columbia v. Little* (178 F. [2d], 13 [D. C. Cir. 1949], affirmed on other grounds, 339 U. S., 1 [1950]), the Fourth Amendment was held to require that an inspector procure a warrant when refused entry, and this result, although making occasional inconveniences for inspecting teams, seems justifiable, since the protection of community health would not seem to necessitate a greater infringement of individual privacy than does protection against crime. As it is unlikely that the typical occupant will exercise his constitutional right to refuse entry and thereby risk alienating the inspecting officer, the *Little* case probably does not in practice present a major obstacle to enforcement of housing codes."

[fol. 101n] This seems to be the only article extant which expresses that view.

Following the *Little* case, *supra,* the Supreme Court of South Carolina had before it the constitutionality of a municipal ordinance directed at the improvement of housing. In the case of *Richards v. City of Columbia,* 227 S. C.,

538, 88 S. E. (2d), 683; the court, in a three to two decision, upheld the constitutionality of the ordinance (with the exception of certain provisions not pertinent here), although, with respect to the question of entry upon premises, the majority opinion states (page 556):

> "* * * this question is not presented in this litigation because there has been no entrance of any premises by the director over the objection of the occupant. * * * It may be added that there is doubt whether such an entrance would come within the constitutional guaranties against unreasonable searches."

The court then referred to the divided opinions in the United States Court of Appeals and in the Supreme Court in the *Little* case, *supra*.

Although it may be argued that that decision is obiter dictum with respect to this particular point, at least the court expressed its view and held valid the provision of the ordinance of the city of Columbia relating to inspections.

In *Givner v. State*, 210 Md., 484, 124 A. (2d), 764, the Court of Appeals of Maryland, in a decision rendered in July 1956, held that municipal ordinances, authorizing health, fire and building inspectors to enter upon premises during daylight hours for the purpose of inspecting such premises to determine compliance with code provisions and fixing a penalty as to the owner or occupier of premises who refused to allow such inspections, were not unreasonable or unconstitutional as an authorization of an illegal search of the premises.

[fol. 101o] Those three cases, *Little*, *Richards* and *Givner*, seem to be the only reported cases in which the issue of inspections without search warrants was considered. The decision of the *Little case*, of course, lacks Supreme Court affirmation on the constitutional question, whereas the decision in the *Richards* case may perhaps only be considered persuasive on the question of entry without a warrant for inspection. The *Givner* case, however, is squarely in point.

An article in 25 George Washington Law Review (October 1956), 1, discusses that case and is helpful in its discussion of housing codes and related problems generally. Be-

cause it is so timely and appropriate to the problem here, excerpts are quoted from it as follows:

(Page 1) "Of all the complex and stubborn problems confronting the cities of our nation, that of urban blight is the most baffling and at the same time the most insidious. * * *"

(Page 3): "A comprehensive program of urban renewal offers a solution for the menace of urban blight. This was the conclusion, concurred in by the President and the Congress, of the President's Advisory Committee on Government Housing Policies and Programs. Urban renewal encompasses rehabilitation and conservation of areas worth saving as well as clearance and redevelopment of areas too deteriorated to be salvable. The term 'urban renewal' was incorporated in the federal law (and later in state statutes) with the enactment of the Housing Act of 1954 which authorized for the first time federal aid for urban renewal projects of local communities."

(Page 4): "An urban renewal program, to be effective, must be undergirded by an effective program of enforcement of adequate police power measures relating to housing, building, zoning and community planning, and must operate in an atmosphere of public understanding and affirmative support of the citizenry. * * *"

[fol. 101p] (Page 10): "In general, a housing code establishes minimum requirements respecting the condition, the maintenance and the occupancy of dwellings and the condition and maintenance of utilities and facilities in dwellings to the extent deemed necessary to achieve safety, health and general welfare objectives. Housing codes prescribe regulatory measures for the maintenance, occupancy and supplied facilities of structures and are concerned primarily with health, safety and sanitation requirements of buildings after they have been constructed. * * *"

(Page 16) "The police power is not exerted solely to protect the public health, the public safety or the

public morals; it is not confined only to the suppression of the offensive, the insanitary or the disorderly. It encompasses the authority to cope with prevailing conditions for the purpose of serving the public welfare. (Footnote—*Bacon v. Walker*, 204 U. S., 311, 318 [1907]. In *Adler v. Deegan*, 251 N. Y., 467, 116 N. E., 705, 711 [1929], Justice Cardozo said of the New York Multiple Dwelling Act enacted in 1929, 'The end to be achieved is more than the avoidance of pestilence or contagion. The end to be achieved is the quality of men and women. * * * If the moral and physical fibre of its manhood and its womanhood is not a state concern, the question is, what is?' * * *)"

(Page 29): "An opinion rendered in July 1956 by the Maryland Court of Appeals in the case of *Givner v. Maryland* contains a timely discussion of the legal aspects of the right of entry under certain Baltimore city codes. In that case, in conformity with the Baltimore city plan, inspectors representing the Commissioner of Health, the Buildings Inspection Engineer, and the Chief Engineer of the Fire Department, accompanied by an electrical inspector and a uniformed policeman, visited the premises of the appellant and asked permission to enter to make an inspection of [fol. 101q] the premises under the Baltimore city codes. The appellant refused the right of entry to the city's inspection team and thereafter in criminal court he was found guilty of violating three code provisions relating to inspection of buildings and was given a suspended sentence of $50 fine and costs.

"The appellant appealed, attacking the ordinances upon the ground that they authorized unlawful searches. In affirming the judgment, the Court of Appeals determined that the inspections involved are not unlawful and do not involve any violation of the Fourteenth Amendment. The court asserted that prohibitions against unreasonable searches and seizures do not bar *reasonable* searches and seizures, citing *United States v. Rabinowitz* [339 U. S., 56, 94 L. Ed., 653, 70 S. Ct., 430]. The proposed inspections, the

court stated, were reasonable, pointing out they were primarily for protective, not punitive, purposes."

(Page 31): "Although some housing codes require the inspector to obtain a court order if he is denied access, many codes apparently require occupants to admit inspectors without a warrant. Where the inspections are to be made at reasonable hours under circumstances clearly showing that the inspections are not to be used to cover a search for violations of criminal law, it would appear that their authorization without a search warrant will not be in contravention of either the Fourteenth Amendment or state constitutional provisions comparable to the Fourth Amendment. The issue is that of personal privacy as against the protection of the public health and safety."

The last sentence quoted above restates in another way the problem which confronts this Court.

If the relator had permitted the Housing Inspector to enter, examine and survey at a reasonable hour as requested, it does not even follow that Section 806-31 would have been invoked. Had the inspection disclosed compli- [fol. 101r] ance with the ordinance, no notice of violation would have been given. Had a notice of violation been given, the relator would have had available the provisions of Section 806-32 for an appeal to the Housing Appeals Board and a hearing before it. In the event of a final notice of violation and order, we must look further with respect to the powers and duties of the Housing Inspector.

Section 806-34 provides:

"Where a notice of violation and order to comply has been served pursuant to Section 806-31 C. G. O. and, upon reinspection at the end of the time specified for compliance and if no petition for a hearing has been filed, it is found that the violation or violations have not been remedied, the Housing Inspector may order the dwelling, or parts thereof affected by the continued violations, vacated in accordance with the following procedure:

"(a) Dwellings shall be vacated within a reasonable time not to exceed 60 days.

"(b) Vacated dwellings shall have all outer doors firmly locked and basement, cellar and first story windows barred or boarded to prevent entry.

"(c) Vacated dwellings shall not again be used for human habitation until written approval is secured from the Housing Inspector.

"(d) If a dwelling or part thereof is not vacated within the time specified in such vacation order the Housing Inspector shall seek a court order in a court of competent jurisdiction for the vacation of such dwelling or part thereof."

Although this section is not involved here, it should be noted that after a reinspection and order to vacate as provided therein the Housing Inspector must then obtain a court order for the vacation of the dwelling involved if the owner or occupant does not comply. Likewise, it is also [fol. 101s] apparent that prosecution under Section 806-83 for the violation of a final order issued under Section 806-31 *et seq.* would have to be based on evidence obtained on the reinspection or at least at some time subsequent to the original inspection contemplated in Section 806-30. Whether a prosecution for failure to comply with such a final order would be valid if based on evidence obtained on a reinspection without a search warrant over the objection of the owner is not before us in this case. However, *State v. Lindway, supra*, appears to be dispositive of that question also.

This issue simply boils down to the question of whether the first inspection authorized under Section 806-30 constitutes unreasonable search and seizure. As to the "seizure" portion of the phrase, the question answers itself, since no seizure is contemplated. As to "search," if we are to follow the rule stated by Prettyman, J., in the *Little* case, the writer can conceive of no circumstances under which a reasonable search could be made, or, to state it another way, any search without a search warrant would be unreasonable. We are not ready to say that the framers

of the Constitution used the word, "unreasonable," for n
purpose whatsoever.

An examination of the pertinent statutes relating t
search warrants, Sections 2933.21 to 2933.31, inclusive, R
vised Code, discloses that none of them are applicable t
inspections such as provided for here, and they add no ligh
to this problem except to show that, if entry were to h
denied except upon production of a search warrant if de
manded, further legislation would be necessary.

The right of a home owner to the inviolability of hi
"castle," should be subordinate to the general health an
safety of the community wherein he lives. Certainly thi
ordinance does not contemplate the invasion of the privac
[fol. 101t] of the home, and, as applied to the relator here
the record confirms the reasonableness of the Housing In
spector's actions.

We, therefore, conclude that an ordinance establishin
minimum standards "governing utilities, facilities and othe
physical things and conditions essential to make dwelling
safe, sanitary and fit for human habitation," and "goverr
ing the conditions and maintenance of dwellings," an
containing a provision which authorizes a housing inspecto
to make inspections of "dwellings, dwelling units, roomin
houses, rooming units and premises located within the city
and which also authorizes such inspector "upon showin
appropriate identification * * * to enter, examine an
survey at any reasonable hour all dwellings" and which re
quires that the "owner or occupant of every dwelling
shall give such inspector "free access to such dwelling * *
at any reasonable hour for the purpose of such inspection
examination and survey," with penalties of fine or imprison
ment or both for violation of such provision, is not violativ
of Section 14 of Article I of the Ohio Constitution prohibit
ing unreasonable searches and seizures.

Accordingly, the judgment of the Court of Appeals i
affirmed.

Judgment affirmed.

WEYGANDT, *C. J.* ZIMMERMAN, STEWART, TAFT, MATTHIA
AND BELL, *JJ.*, concur.

[fol. 102]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OHIO

Case No. 35488

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 2, 1959

[fol. 103] Notice is hereby given that Earl Taylor the Appellant hereby appeals to the Supreme Court of the United States from the final order of affirming the judgment of the Court of Appeals remanding the appellant Earl Taylor into the custody of the Chief of Police Dayton, Ohio and reversing the Court of Common Pleas releasing the appellant Earl Taylor from the custody of said Chief of Police, entered on the 8th day of October, 1958.

Said appeal is taken pursuant to 28 U. S. C. 1257-2 and involves a constitutional question in connection with the fourth and fourteenth amendments of the constitution of the United States.

/s/ Earl Taylor

Proof of Service (omitted in printing).

[fol. 104] [File endorsement omitted]

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

Case No. 111,465

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 5, 1959

[fol. 105] 1. Notice is hereby given that Earl Taylor the Appellant hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court

of Ohio affirming the judgment of the Court of Appea
remanding the Appellant Earl Taylor into the custody
the Chief of Police of Dayton, Ohio, and reversing t
judgment of the Court of Common Pleas releasing t
Appellant Earl Taylor on a Writ of Habeas Corpus fro
the custody of said Chief of Police, which judgment of t
Supreme Court of Ohio was entered on the 8th day
October 1958.

This appeal is taken pursuant to 28 U S C 1257-2.

Appellant Earl Taylor was charged with an offense und
ordinance 18099 section 806.30 sub-section a which ga
the Housing Inspector free access to every dwelling at a
reasonable hour for the purpose of inspection, examin
tion and survey of homes in the City of Dayton, Ohi
Said ordinance was known as the housing ordinance of t
City of Dayton, Ohio.

When the Appellant refused permission to the Housi
Inspector to enter his private home without a search wa
rant, he was arrested. After pleading "not guilty" to sa
charge Appellant was placed under a one thousand doll
($1,000.00) bond by the Municipal Judge, upon his failu
[fol. 106] to give said bond he was incarcerated in the ci
jail until released on a Writ of Habeas Corpus.

The Appellant Earl Taylor claimed that the housing an
health ordinance was unconstitutional and that the pr
posed inspection constituted an unreasonable and illeg
search of his home, a wrongful trespass upon his proper
and a wrongful taking thereof without due process of la
all in violation of his constitutional rights under the four
and fourteenth amendments of the Constitution of t
United States.

The trial judge in the Court of Common Pleas whe
the Writ of Habeas Corpus was brought released the A
pellant Earl Taylor on his own recognizance and held sa
ordinance unconstitutional and in violation of the four
amendment of the United States Constitution and in viol
tion of acticle I section 14 of the Constitution of the Sta
of Ohio.

II. The Clerk, please prepare a Transcript of the rec
in this cause for Transmission to the Clerk of the Supre

Court of the United States and include in said transcript the following:

1. The petition for a writ of Habeas Corpus.

2. An answer if any was filed.

3. The Journal Entry of the Court of Common Pleas.

4. The Journal Entry of the Court of Appeals.

[fol. 107] 5. The Bill of Exceptions and the exhibits attached thereto.

III. The following questions are presented by this appeal:

No. 1 Can a housing inspector of the city of Dayton, Ohio, inspect a private home under an ordinance establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make a dwelling safe, sanitary and fit for human habitation without a search warrant if the owner or occupant objects to said inspection?

No. 2 Did the Supreme Court of Ohio err in sustaining the Court of Appeal for the 2nd District of Ohio, overruling the Trial Judge in this Case by sustaining the validity of an ordinance of the City of Dayton, Ohio to wit 18099-Section 806.30 and Section 806.83 and of the proposed inspection of Appellants private home under said ordinance sought to be made thereunder in the day time without a search warrant, against the Appellant Earl Taylor's objection, Appellant claiming that said section of the ordinance was repugnant to the fourth and fourteenth amendments of the Constitution of the United States, sought to be made by an employee working under the housing inspector?

The Appellant by said judgment was remanded into the custody of the Chief of Police of the City of Dayton and [fol. 108] reversed the Trial Court after said Trial Court held said ordinance invalid and unconstitutional as it applies to private homes when the owner or occupant does not waive his constitutional right to a search.

No. 3 Did the proposed inspection constitute an unreasonable and illegal search of the Appellant Earl Taylor's home, a wrongful trespass upon his property and a wrongful taking thereof without due process of law, all in violation of his constitutional rights under the fourth and fourteenth amendments of the Constitution of the United States.

Earl Taylor, 130 Henry Street, Dayton, Ohio.

Proof of Service (omitted in printing).

[fol. 109] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 110]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OHIO

Case No. 35488

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 6, 1959

[fol. 111] Notice is hereby given that Earl Taylor the Appellant hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Ohio affirming the judgment of the Court of Appeals remanding the Appellant Earl Taylor into the custody of the Chief of Police of Dayton, Ohio, and reversing the judgment of the Court of Common Pleas releasing the Appellant Earl Taylor on a Writ of Habeas Corpus from the custody of said Chief of Police, which judgment of the Supreme Court of Ohio was entered on the 8th day of October 1958.

This appeal is taken pursuant to 28 U S C 1257-2.

Appellant Earl Taylor was charged with an offense under ordinance 18099 section 806.30 sub-section a which gave the Housing Inspector free access to every dwelling at any reasonable hour for the purpose of inspection, ex-

amination and survey of homes in the City of Dayton, Ohio. Said ordinance was known as the housing ordinance of the City of Dayton, Ohio.

When the Appellant refused permission to the Housing Inspector to enter his private home without a search warrant, he was arrested. After pleading "not guilty" to said charge Appellant was placed under a one thousand dollar ($1,000.00) bond by the Municipal Judge, upon his failure to give said bond he was incarcerated in the city jail until [fol. 112] released on a Writ of Habeas Corpus.

The Appellant Earl Taylor claimed that the housing and health ordinance was unconstitutional and that the proposed inspection constituted an unreasonable and illegal search of his home, a wrongful trespass upon his property and a wrongful taking thereof, without due process of law, all in violation of his constitutional rights under the fourth and fourteenth amendments of the Constitution of the United States.

The trial judge in the Court of Common Pleas where the Writ of Habeas Corpus was brought released the Appellant Earl Taylor on his own recognizance and held said ordinance unconstitutional and in violation of the fourth amendment of the United States Constitution and in violation of article I section 14 of the Constitution of the State of Ohio.

II. To The Clerk, please prepare a Transcript of the record in this cause for Transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. A record of the docket and Journal Entries
2. The Journal Entry of the Supreme Court to carry out the decision of said court
3. Application for rehearing.

[fol. 113] 4. Entry denying Application for rehearing.

III. The following questions are presented by this appeal:

No. 1 Can a housing inspector of the city of Dayton, Ohio, inspect a private home under an ordinance establish-

ing minimum standards governing utilities, facilities and other physical things and conditions essential to make a dwelling safe, sanitary and fit for human habitation without a search warrant if the owner or occupant objects to said inspection?

No. 2 Did the Supreme Court of Ohio err in sustaining the Court of Appeal for the 2nd District of Ohio, overruling the Trial Judge in this Case by sustaining the validity of an ordinance of the City of Dayton, Ohio to wit 18099—Section 806.30 and Section 806.83 and of the proposed inspection of Appellants private home under said ordinance sought to be made thereunder in the day time without a search warrant, against the Appellant Earl Taylor's objection, Appellant claiming that said section of the ordinance was repugnant to the fourth and fourteenth amendments of the Constitution of the United States, sought to be made by an employee working under the housing inspector?

The Appellant by said judgment was remanded into the custody of the chief of Police of the City of Dayton and [fol. 114] reversed the Trial Court after said Trial Court held said ordinance invalid and unconstitutional as it applies to private homes when the owner or occupant does not waive his constitutional right to a search.

No. 3 Did the proposed inspection constitute an unreasonable and illegal search of the Appellant Earl Taylor's home, a wrongful trespass upon his property and a wrongful taking thereof without due process of law, all in violation of his constitutional rights under the fourth and fourteenth amendments of the Constitution of the United States?

/s/ Earl Taylor, 130 Henry Street, Dayton, Ohio.

Proof of Service (omitted in printing).

[fol. 115] Clerk's Certificat to foregoing transcript (omitted in printing).

[fol. 116]

SUPREME COURT OF THE UNITED STATES

No. 699, October Term, 1958

OHIO ex rel. EATON, Appellant,

vs.

PRICE, Chief of Police.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

June 8, 1959

Mr. Justice Brennan who voted to note probable jurisdiction filed a separate memorandum.

Mr. Justice Frankfurter, Mr. Justice Clark, Mr. Justice Harlan, and Mr. Justice Whittaker who voted against noting probable jurisdiction filed a separate memorandum.

Mr. Justice Clark who voted against noting probable jurisdiction filed a separate memorandum.

Mr. Justice Stewart took no part in the consideration or decision of this application.

(See Opposite) ☞

SUPREME COURT OF THE UNITED STATES

OHIO EX REL. EATON *v.* PRICE, CHIEF OF POLICE.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 699. Decided June 8, 1959.

PER CURIAM.

Probable jurisdiction is noted.

MR. JUSTICE BRENNAN who voted to note probable jurisdiction filed a separate memorandum.

MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER, who voted against noting probable jurisdiction filed a separate memorandum.

MR. JUSTICE CLARK who voted against noting probable jurisdiction filed a separate memorandum.

MR. JUSTICE STEWART took no part in the consideration or decision of this application.

SUPREME COURT OF THE UNITED STATES

No. 699.—October Term, 1958.

Ohio, ex rel. Eaton, Appellant, v. Price, Chief of Police.	On Appeal From the Supreme Court of Ohio.

[June 8, 1959.]

Mr. Justice Brennan.

The Court's practice, when considering a jurisdictional statement whereby a litigant attempts to invoke the Court's jurisdiction on appeal, is quite similar to its well-known one on applications for writs of certiorari. That is, if four Justices or more are of opinion that the questions presented by the appeal should be fully briefed and argued orally, an order noting probable jurisdiction or postponing further consideration of the jurisdictional questions to a hearing on the merits is entered. Even though this action is taken on the votes of only a minority of four of the Justices, the Court then approaches plenary consideration of the case anew as a Court; votes previously cast in Conference that the judgment of the Court appealed from be summarily affirmed, or that the appeal be dismissed for want of a substantial federal question, do not conclude the Justices casting them, and every member of the Court brings to the ultimate disposition of the case his judgment based on the full briefs and the oral arguments. Because of this, disagreeing Justices do not ordinarily make a public notation, when an order setting an appeal for argument is entered, that they would have summarily affirmed the judgment below, or have dismissed the appeal from it for want of a substantial federal question. Research has not disclosed any instance of such notations until today.[1]

[1] Likewise, dissents from orders granting certiorari are ordinarily not publicly noted, even though the grant or denial of certiorari, as we have often said, expresses no intimation as to the merits of a

The reasons for such forebearance are obvious. Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case, and public expression of views on the merits of a case by a Justice before argument and decision may well be misunderstood; the usual practice in judicial adjudication in this country, where hearings are held, is that judgment follow, and not precede them. Public respect for the judiciary might well suffer if any basis were given for an assumption, however wrong in fact, that this were not so. Thus, the practice of not noting dissents from such orders has been followed, regardless of how strongly Justices may have felt as to the merits of a case or how clearly they have thought decision in it controlled by past precedent.[2] A precedent which appears to some Justices, upon the preliminary consideration given a jurisdictional statement, to be completely controlling may not appear to be so to other Justices. Plenary consideration can change views strongly held, and on close, reflective analysis precedents may appear inapplicable to varying fact situations. I believe that this approach will obtain in this case despite the unusual notation made today by four of my colleagues.

---

case. The sole exception found appears to be *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 937, where the extraordinary power to grant certiorari before judgment in the Court of Appeals was exercised, and two Justices expressed their view that judgment in that court should have been obtained before this Court reviewed the case. Of course, in these circumstances, the notation could not possibly have implied or have been taken to imply any view of the case on the merits.

[2] Notation of dissent from a denial of certiorari, or from a summary disposition of an appeal, is a completely different matter. Such notations occur with some frequency and I have made them myself. They are expressions of a Justice's view that a case should be heard when the Court decides not to have a hearing. Obviously such notations do not tend to foreclose or embarrass consideration of the case when it is later heard, since by definition it is not to be heard.

SUPREME COURT OF THE UNITED STATES

No. 699.—October Term, 1958.

Ohio ex rel. Eaton, Appellant; v. Price, Chief of Police.	On Appeal From the Supreme Court of Ohio.

[June 8, 1959.]

Mr. Justice Frankfurter, Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker are of the view that this case is controlled by, and should be affirmed on the authority of, *Frank* v. *Maryland*, — U. S. —, decided on May 4, 1959.

The *Frank* case was decided on May 4. Application to review this case came before us within two weeks of the *Frank* decision. Since we deem the decision in the Maryland case to be completely controlling upon the Ohio decision, we are of the opinion that it would manifest disrespect by the Court for its own process to indicate its willingness to create an opportunity to overrule a case decided only a fortnight ago after thorough discussion at the bar and in the briefs and after the weightiest deliberation within the Court.

SUPREME COURT OF THE UNITED STATES

No. 699.—October Term, 1958.

Ohio ex rel. Eaton, Appellant, v. Price, Chief of Police.	On Appeal From the Supreme Court of Ohio.

[June 8, 1959.]

Mr. Justice Clark.

This case cannot be considered in isolation. In his jurisdictional statement filed February 12, 1959, appellant stated that No. 278, *Frank* v. *Maryland*, "is similar to the facts in this case at bar and involves the same constitutional questions," thus raising "substantially the same problems presented by this appeal." We, therefore, held this case awaiting the decision in No. 278, *Frank* v. *Maryland*. It was decided May 4, 1959, by a 5–4 vote. Thereafter this case was again considered and Brother Stewart, who was with the majority in *Frank*, recused himself because the case came from Ohio's Supreme Court, where his father then served. After a study of the two cases I agreed with appellant that this case "similar to the facts," involved the same constitutional questions and raised "substantially the same problems" as the *Frank* case. In fact, as presented here, the cases appeared to be on all fours, except that the penalty provision in Maryland's Act is $20, while that of Ohio's law is a maximum of $200, or a jail sentence not exceeding 30 days. I therefore voted to affirm. My brothers in the majority in *Frank* voted likewise. However, the four dissenters in *Frank* voted to note probable jurisdiction and bring the case on for argument. The result, for all practical purposes, is a reconsideration of the constitutional question decided in *Frank* by a full Court. This flies in the face of the real purpose, as well as the intended effect, of our Rule 58

which permits rehearings only "at the instance of a justice who concurred in the judgment or decision . . . ." It likewise is, in my view, very poor judicial administration, especially since *Frank* was decided less than four weeks ago and only an eight-man Court can sit to review the question decided there.

Believing that the Bar will be confused by this action today, which beyond doubt will be characterized as a reconsideration of the *Frank* holding, I have noted my adherence to *Frank*. Otherwise my silence would be construed as acquiescence in a reconsideration of that case. While I have followed a policy of not noting my vote in Conference, except on the merits, our reports are full of such notations.

FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 12 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958.

Case No. [redacted]30

THE STATE, *ex rel.* EATON,
Appellant,
vs.
PRICE, CHIEF OF POLICE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

J. HARVEY CROW,
Urbana, Ohio,
Counsel for Appellant.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1958.

Case No. _____

THE STATE, *ex rel.* EATON,
Appellant,

vs.

PRICE, CHIEF OF POLICE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

The Appellant appeals from the final judgment of the Supreme Court of Ohio remanding him to the custody of the Chief of Police for the Crime of violating one of the Housing and Health Ordinances of the City of Dayton, Ohio after he had been released on a Writ of Habeas Corpus by a Court of General Jurisdiction, said Court holding that the ordinance was unconstitutional, in violation of the Ohio and United States Constitution.

He submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW.

The opinion of the Trial Court for a Writ of Habeas Corpus which involves a similar question presented here is not officially reported but is set forth in the Appendix, pages 2a to 12a.

The Court of Appeals reversed the Trial Court and held that the ordinance in question is not unconstitutional by a two to one decision. A dissenting opinion was written. The opinion of the court is officially reported in 105 Ohio App., 376. This opinion is set forth in Appendix, pages 14a to 37a. The Supreme Court of Ohio affirmed the Court of Appeals of the 2nd District of Ohio and reversed the Trial Court holding that the ordinance was not in violation of the Constitution of Ohio nor the Constitution of the United States or any of its amendments thereto. Said opinion is officially reported in 168 O. S, pages 123. Said opinion is found in Appendix, pages 38a to 57a.

Application for rehearing was denied without opinion by order unofficially reported in 31 Ohio Bar (Oct. 13, 1958) 895.

JURISDICTION.

Prosecution was brought by the City of Dayton for violation by Appellant of the provisions of Dayton City Ordinance 18099 Section 806.30 in that he refused entry of his private home to a housing inspector, which under said ordinance gave such inspector the right of entry without permission, without even suspecting that a nuisance existed. A Housing Inspector sought to inspect the interior of the appellant's home without a search warrant and over the objection of the appellant.

When the Appellant, Earl Taylor, was placed under One Thousand Dollar ($1,000.00) Bond, he was remanded to jail upon his failure to give bond; a Writ of Habeas Corpus was filed in the Court of Common Pleas, at which time the appellant contended the Ordinance 18099, Section 806.30 was in violation of his constitutional rights as provided in Ohio Constitution Article I, Section 14, and United States Constitution and its amendments thereto—Amendments four and fourteen.

Judgment of Trial Court in the Writ of Habeas Corpus proceedings was in favor of the appellant, said Court holding said ordinance 18099, Section 806.30 was a violation of the appellant's constitutional right when he chose to defy the housing inspector's permission to inspect his private home without a search warrant. The Court held that the ordinance was not in itself unconstitutional but the appellant, Earl Taylor, had the right to waive or exercise his constitutional right. When he chose to exercise his constitutional right, then such ordinance is unenforceable as to him, and repugnant to the Constitution of Ohio and Constitution of the United Sates and its Amendments thereto.

Notice of Appeal was filed January 5, 1959, with the Clerk of the Supreme Court of Ohio, and in the Court of Common Pleas of Montgomery County, Ohio, within 90 days from overruling the application for rehearing October 8, 1958, as provided by Rule 11, Section I of the Supreme Court of the United States and as required by U. S. C. Title 28, Section 2101.

STATUTORY PROVISION CONFERRING JURISDICTION.

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant case is conferred by title 28, United States Code, Section 1257-2, since the validity of a state statute[1] on the ground of repugnancy to the Constitution of the United States is drawn in question and the final decision of the Court below is in favor of its validity.

If the appeal should be considered as having been improvidently taken, the Court is requested to consider such appeal as petition for certiorari under title 28, U. S. C. 2103.

CASES BELIEVED TO SUSTAIN JURISDICTION.

The following decisions sustain the Jurisdiction of the Supreme Court of the United States, to review the judgment on appeal in this case.

Wolf vs. People of State of Colorado, 338 United States 25;
Palko vs. State of Conn., 302 U. S. 319;
Twining vs. State of New Jersey, 211 U. S. 78;
Paulos vs. New Hampshire, 345 U. S. 395;
Frank vs. State of Maryland, Case No. 278, October Term, 1958.

Aaron D. Frank, Appellant, vs. State of Maryland, Appellee, Case No. 278, is similar to the facts in this case at bar and involves the same constitutional questions as to whether a city ordinance is repugnant to the United States

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[1] In this instance, a Municipal ordinance; See *Paulos vs. New Hampshire*, 345 United States, 395, 402.

Constitution when a home owner refuses permission to inspect his home without a search warrant, has recently been admitted by this Court for review.

STATUTES INVOLVED.

Dayton City Ordinances, Ordinance Number 18099, Section 806.30 and Section 806.83 are set forth in the Appendix at pp. 1a and 2a.

Amendments to the Constitution of the United States, Article IV, provides (1 United States Code, 1952 Edition, XLIV):

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.".

Amendments to the Constitution of the United States, Article XIV, provides, in part (1 United States Code, 1952 Edition, XLV):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 14 of the Ohio Constitution provides as follows:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

QUESTIONS PRESENTED.

No. 1. Can a housing inspector of the City of Dayton, Ohio, inspect a private home under an ordinance establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make a dwelling safe, sanitary and fit for human habitation without a search warrant if the owner or occupant objects to said inspection?

No. 2. Did the Supreme Court of Ohio err in sustaining the Court of Appeals for the 2nd District of Ohio, overruling the Trial Judge in this Case by sustaining the validity of an ordinance of the City of Dayton, Ohio to-wit: 18099, Section 806.30 and Section 806.83 and of the proposed inspection of Appellant's private home under said ordinance sought to be made thereunder in the daytime without a search warrant, against the Appellant, Earl Taylor's objection; Appellant claiming that said section of the ordinance was repugnant to the fourth and fourteenth amendments of the Constitution of the United States?

The Appellant, by said judgment, was remanded into the custody of the Chief of Police of the City of Dayton. The final judgment reversed the trial court after said trial court held said ordinance invalid and unconstitutional as it applies to private homes when the owner or occupant does not waive his constitutional right to a search.

No. 3. Did the proposed inspection constitute an unreasonable and illegal search of the Appellant's, Earl Taylor's, home, a wrongful trespass upon his property and a wrongful taking thereof without due process of law, all in violation of his constitutional rights under the fourth and fourteenth amendments of the Constitution of the United States?

STATEMENT OF FACT.

The record discloses on March 20, 1957, one Earl Taylor was served by a police officer with an instrument, captioned "Affidavit and Warrant," issued out of the Dayton Municipal Court. The affidavit, sworn to and signed by one George Cooper on March 19, states that "on or about the 12th day of March, A. D., 1957 * * * Earl Taylor, being the owner of premises located at 130 Henry Street, did unlawfully refuse to permit a duly authorized agent of the Division of Housing Inspection of the City of Dayton, to enter and survey the said premises for the purposes of repairs or alteration as are necessary to comply with the provisions of minimum housing standards contrary to the form of the ordinances to-wit: Section 806.30 of Dayton, Ohio * * *."

When served with the affidavit and warrant, he was not physically placed under arrest, but was ordered to appear in Municipal Court on March 26. On that day, he appeared in Court, entered a plea of not guilty, and, bond having been fixed in the sum of One Thousand Dollars ($1,000.00). Upon failure to provide bond, he was placed in jail. Late in the afternoon of the same day, a Writ of Habeas Corpus was sought in the Common Pleas Court of Montgomery County against the Chief of Police of Dayton

on the application of Arthur T. Eaton to produce the body of Taylor, at which time he was released on his own recognizance by order of the Court, and the matter was set for hearing on April 8.

Following the hearing, the Writ was allowed on May 26, 1957, and Taylor was discharged from custody, the Court finding in its entry that "Section 806.30 of the Code of General Ordinances of the City of Dayton, Ohio, being ordinance No. 18099 * * * is unconstitutional as it applies to the facts in this case as violative of the Fourth Amendment to the Constitution of the United States and Article I, Section 14 of the Constitution of the State of Ohio."

Said case appears on the docket of the Municipal Court, Dayton, Ohio, in case number 163162, entitled City of Dayton vs. Earl Taylor.

The Appellant, Earl Taylor, lived in Dayton for over 63 years, resided with his wife in their home at 130 Henry Street for more than 11 years.

When the inspectors appeared at the appellant's home, he inquired of them what they wanted to inspect and they said, "According to this ordinance, we got a right to go through your house and inspect your house."

The appellant replied, "I don't think you have, unless you got a search warrant."

The Appellant inquired of the housing inspector employee what he was looking for, said employee could not tell him, just said "I want to inspect the whole inside of your house."

The inspectors came three or four times and requested permission before the affidavit was filed. Said inspectors had been making a door to door check of the various premises in the vicinity of the appellant's home.

It is admitted this was a private home, there were no rented rooms, no boarders nor any tenants in the house.

Their home consisted of a one floor plan cottage with two (2) bedrooms, bath and the other usual rooms in the home.

The mayor and the city commission of Dayton, Ohio, exercising within the limits of that city all of the police power of the State of Ohio enacted ordinance No. 18099.

The plight of the petitioner and appellant grows out of an ordinance of the City of Dayton, Ohio, which said ordinance is designated "An ORDINANCE establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation."

The ordinance provides, among other things, that the owner or occupant of every dwelling, dwelling unit, rooming house and rooming unit shall give the housing inspector free access to such dwelling, dwelling unit, rooming house or its premises, at any reasonable hour for the purposes of inspection, examination and survey.

The ordinance provides, that any person who shall violate any provision of this ordinance, upon conviction, shall be punished by a fine of not less than $20.00 nor more than $200.00, or by imprisonment of not less than two days nor more than thirty days, or both.

The petitioner refused to permit housing inspectors to enter his home on several different occasions without a search warrant, and pursuant to the penalty provision of the ordinance he was arrested by the Police Department of the City of Dayton, Ohio, for the violation of said ordinance, namely, refusing to allow a housing inspector to

enter his private dwelling for the purpose of making an inspection of his premises.

The appellant contended that the ordinance was repugnant to the Constitution of the United States in violation of the fourth and fourteenth amendments.

The appellant contended in the state Courts that his incarceration in the City Jail was a violation from his rightful refusal to submit to an unreasonable and illegal search of his home sought to be made under the ordinance in violation of the fourth amendment and without due process of law assured him by the fourteenth amendment to the Constitution of the United States.

HOW THE FEDERAL QUESTIONS ARE PRESENTED.

At every stage of the cause, appellant vigorously attacked Dayton City Ordinance 18099, Sections 806.30 and 806.88, the ordinance on which the prosecution and incarceration is based, on the grounds that the ordinance subjected him to an unreasonable and illegal search of his house, a wrongful trespass upon his property and a wrongful taking thereof without due process of law, all in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States, and was repugnant to each of the Amendments and hence invalid.

In the Court of Common Pleas, the Trial Court in this case, the attack upon the ordinance was first made by the filing of the Writ of Habeas Corpus and of the urging by the appellant of the rights outlined in the case of *Wolf vs. Colorado*, 338 U. S. 25, and of the case of *District of Columbia vs. Little*, 178 Federal 2d 13, 339 U. S. 1, in

which it was contended that the arbitrary intrusion into privacy is prohibited by the due process clause of the 14th amendment and that the core of the 4th amendment is the security of one's privacy against arbitrary intrusion.

The trial Court, in its opinion, found that the ordinance enacted by the City Commission, to-wit, 18099, Sections 806.30 to 806.83 were not in and of itself unconstitutional but became unconstitutional when the appellant refused to waive his constitutional objections to a search of his home without a search warrant.

The Court of Appeals that reviewed the trial court's decision, in a two to one decision, held that the appellant has no authority to keep out the housing inspector and that the ordinance is a valid exercise of the police power.

One of the appellate judges dissented from the majority and held with the Trial Court and said:

> "It is conceded that the question before us is new and controversial. The very lack of authority on the point is mute but eloquent testimony that not until recently have municipalities presumed to enter private dwellings in the manner and for the purpose herein involved."[2]

The Supreme Court of Ohio held that the ordinance was not in violation of Article I, Section 14 of the Ohio Constitution prohibiting unreasonable searches and seizures. Article I, Section 14 is almost verbatim with the Fourth Amendment to the Constitution of the United States.

From that judgment, this appeal is brought here.

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[2] Appendix, pages 35a, 36a.

THE QUESTIONS ARE SUBSTANTIAL.

The appellant, Earl Taylor, the defendant in the criminal prosecution in the Municipal Court of Dayton, Ohio for violation of the housing ordinance of Dayton, Ohio, in his Writ for Habeas Corpus, urged that the ordinance was invalid because repugnant to the federal constitution in that it subjected him to an unreasonable and unlawful search of his residence in violation of the Fourth Amendment and without the due process of law secured to him by the Fourteenth Amendment.

The Trial Court below allowed the Writ of Habeas Corpus and held the ordinance unconstitutional. The appellate Court reversed said decision and the Supreme Court of Ohio upheld the appellate Court. All of said Courts wrote opinions which are attached hereto. See Appendix.

The upholding of this ordinance brings this case within the purview of Title 28, United States Code, Section 1257-2, the jurisdictional provision relied on by the appellant.

The cause presents portentous and pervasive issue arising from impingement of an attempted exercise of the police powers of the State, respecting protection of the public health, upon one of the fundamental tenets of individual liberty basic to our free society, the individual's right to be secure in the privacy of his home from arbitrary intrusion by government officials without a search or other proper warrant. The proposed search (inspection) constituted just such an arbitrary, unwarranted and unlawful invasion of privacy.

This Court has said that:

"While the question has never been directly decided by this Court, it has always been assumed that

one's house cannot lawfully be searched without a search warrant except as an incident to a lawful arrest therein."[3]

And:

"The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws."[4]

As recently as *Miller v. United States,* U. S. , 78 S. Ct., 1189, 1195, 2 L. ed. 2d 1332, 1337 (decided June 23, 1958), this Court saw fit to emphasize the sanctity of "the precious interest of privacy summed up in the ancient adage that a man's house is his castle," quoting the remarks on that principle attributed to the Earl of Chatham:

"The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter; * * *. All his forces dares not cross the threshold of the ruined tenement!"

Aside from the question whether the Fourth Amendment should be given effect against the State in the circumstances of the instant cause,[5] it now seems settled that protection of the security of one's privacy against arbitrary intrusion by government officers is among those guaranties basic to our free society, implicit in "the concept of

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[3] *Agnello v. United States,* 269 U. S. 20, 32.

[4] *Id.*, at page 32.

[5] Appellant expects, if granted a hearing on the merits of this appeal, to present and to argue this important question, while the issue may be considered by many to be closed *(Wolf v. Colorado, supra)*, respectable opinion to the contrary seems to exist. (See dissenting opinion of Mr. Justice Black in *Adamson v. California*, 332 U. S. 46, 68, and opinions in *Wolf v. Colorado, supra*, of Mr. Justice Black (338 U. S. 25, 40), concurring, and Mr. Justice Rutledge (338 U. S. 25, 47), dissenting.)

ordered liberty," enforceable against the states through the Due Proces Clause. *Wolf v. Colorado, supra: Palko v. Connecticut, supra, Twining v. New Jersey, supra.*

In *Wolf v. Colorado*, 338 U. S. 25, 27, 28 (1949), in dealing with the question whether a conviction in a state Court violated the Due Process Clause, because evidence admitted at the trial would have been excluded in a federal prosecution because obtained in a manner offending the Fourth Amendment, the Court said:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and basic constitutional documents of English-speaking people.
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

If one were to read "Housing Inspectors" in the place of "Police," the Court's statement would seem to apply with no less vigor to the instant case. Certainly the search here was sought to be made solely on the authority and convenience of the housing inspector, and was affirmatively sanctioned by the City in the ordinance.

Appellant was well within his constitutional rights in refusing admittance to his home to the housing inspector who had no warrant. He rightfully refused to

comply with an ordinance purporting to authorize an unlawful search of his house without a warrant. *District of Columbia v. Little*, 85 U. S. App. D. C. 242. The instant case involves problems quite similar to those sought to be presented to this Court in that case. *District of Columbia v. Little*, 339 U. S. 1.

There, the defendant-respondent was convicted in the trial court of interfering with a District of Columbia health officer by locking the door to her home, refusing the officer admittance and protesting her constitutional right to be secure from his search or inspection in the absence of a warrant. Two intermediate reviewing courts[6] found that the conviction was erroneous, on constitutional grounds, and the District petitioned this Court for certiorari.

There, the obverse side, *i.e.* "important questions concerning legal provisions for protecting the health of the people by special and periodic inspection and elimination of potential sources of disease" (339 U. S. at pages 1, 2, 3), of the very same questions here involved was apparently thought to be of sufficient importance to warrant this Court's granting certiorari on application of the government. The questions are now brought here on the appeal of the citizen, and from the other side of the case, would not seem to lessen their weight and importance. Indeed, since the appellant, Earl Taylor, claims to seek, in his defense, no more than enforcement of one of the fundamental guaranties of individual liberty basic to our system of government, considerations even graver than protection of the public health would now seem to militate

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[6] *Little v. District of Columbia*, Municipal Court of Appeals for the District of Columbia, 62 A. 2d 874. *District of Columbia v. Little*, United States Court of Appeals for the District of Columbia Circuit, 85 U. S. App. D. C. 242.

in favor of this Court's entertaining the issues in the instant case.

Little and the *Frank* cases appear to be the only cases heretofore brought to this Court directly presenting, or approaching, the particular conflict here involved between the essential safeguards against unreasonable searches afforded the individual under federal constitutional guarantee and the necessary exercise by the government (of the state or other political subdivision) of its police power to protect the public health. Jurisdiction would seem to be sustained (as to the substantive questions) and plenary consideration warranted in the instant case by *Little* and the *Frank* cases alone. While the *Little* case arose directly under the Fourth Amendment that dissimilarity in the two cases would seem to be obviated by the holding in *Wolf v. Colorado* that the Fourth Amendment's prohibition against unreasonable searches is enforceable against the States.

Of course, in *Little*, this Court declined to decide the constitutional questions, applying instead its policy to dispose of a cause on non-constitutional grounds where the record permits, and this despite that such disposition (which was favorable to defendant-respondent) there rested on determination by this Court of an interpretative question (whether respondent's statements and actions constituted "interference" with the health officer within the meaning of the pertinent statutes and regulations of the District) which the lower courts had not decided.[7]

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[7] *District of Columbia v. Little*, 339 U. S. 1. Two justices dissented and advanced the dictum that "* * * the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepte

(Continued on following page)

In the instant case, the validity of the search authorized by the ordinance, which appellant assails on constitutional grounds, is squarely in issue and was clearly and necessarily ruled on by the lower courts. Indeed, the claimed invalidity of the ordinance constituted appellant's only defense.

The opinions written by the trial Court, the majority opinion and the dissenting opinion in the Court of Appeals and the opinion of the Supreme Court of Ohio, carefully considered the appellant's claim that his incarceration was in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States of America, but only the trial court and the dissenting judge of the Court of Appeals found the ordinance to be in violation of the Fourth Amendment.

Both the majority and minority opinions as noted in the appendix attached hereto referred to the case of *Givner vs. State of Maryland*, 124 Atl. 2d 764; 210 Maryland 484.

The determinations of federal constitutional principles made in *Givner* collide head-on with exactly contrary holdings on essentially the same (in view of *Wolf vs. Colorado, supra*) issues made by the United States Court of Appeals for the District of Columbia Circuit in *District of Columbia v. Little, supra*, where it was held by the majority that under the Fourth Amendment against un-

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(Continued from preceding page)

and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as is required by the Fourth Amendment to protect the right of the people to be secure in their persons, houses, and effects against unreasonable searches and seizures," 339 U. S. pages 1, 8, 9.

The existence and tenor of the dissent would seem to point up the importance of the problem.

reasonable searches, the defendant-respondent was within her constitutional rights in refusing admittance to her home to a health inspector without a warrant. The chief basis of the decision in *Givner* seems to have been the Maryland court's feeling that the proposed inspection there was not "a search for evidence to prove guilt of a crime" (210 Md. 484, 504), which would admittedly have been abhorrent under the Fourteenth Amendment and that the inspection was hence beyond the pale of the protective Amendment.* Similar reasoning, *i.e.* that the Fourth Amendment relates only to searches in connection with criminal prosecutions or enforcement of penalties, and does not affect matters such as housing department inspections, which are said to be civil, rather than criminal, in nature, seems to have motivated the dissenting opinion in the United States Court of Appeals in *Little*, *supra*.

A ready answer to this proposition, as well as to other arguments in support of the *Givner* rule, is advanced in the comprehensive and well-reasoned majority opinion in *Little* in the United States Court of Appeals:

> "It is said to us that therefore there is no prohibition against searches of private houses by government officers, unless they are searching for evidence of crime; that if they are searching for evidence of crime, they must get a search warrant, but that if they are searching for something else or are just searching, they need not get a search warrant; for searches of the latter sort, we are told, home owners must open their front doors upon demand of an officer without a warrant. The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches * * * was the common-law right

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* The Maryland Court seemed to have been impressed by the fact that this Court avoided deciding the constitutional question in *Little* (210 Md. 484, 499, 500).

> of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization * * *. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected * * *. To say that a man suspected of crime has the right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

And there is no lack of opinion in this Court condemning the invasion of private dwellings by government officials without the intervention of a magistrate or other judicial officer. *Agnello v. United States*, 269 U. S. 20-32; *Harris v. United States*, 331 U. S. 145; *Davis v. United States*, 328 U. S. 582; *Johnson v. United States*, 333 U. S. 10; *McDonald v. United States*, 335 U. S. 451; *Wolf v. Colorado, supra; Miller v. United States, supra; Jones v. United States*, U. S. , 78 S. Ct. 1253, 2 L. ed. 2d 1514.

The constitutional questions herein discussed were fairly raised below, are substantial and important. Their determination will affect large numbers of property owners and others in Dayton, Ohio and elsewhere in Municipalities and political subdivisions having comparable Housing regulations.[1] The only two reported cases in the country which have treated the constitutional problem, *Givner* and *Little*, appear to be directly opposed. It is submitted that the conclusions reached in *Little* by the United States Court of Appeals are supported by the better reason and authorities than that of the Supreme Court of Ohio and the majority opinion of the appellate court which followed the *Givner* case and the minority opinion in the *Little* case.

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[1] Most of our metropolitan cities in the United States of America now have similar Housing Ordinances as is found in the City of Dayton, Ohio.

This Court has admitted for review the case of *Frank vs. State of Maryland*, October term, 1958, number 278, which involves substantially the same problems presented by this appeal.

If this Court would admit this case, both the *Frank* case and this case could be argued at the same time to this Court.

The questions are substantial, are of great public importance both to the citizens of the State of Ohio and citizens of other states in the union where they have similar ordinances creating housing inspection as well as to the public officials who are attempting to enforce said housing inspection.

We believe that this question merits plenary consideration by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX.

ORDINANCE NO. 18099 OF THE CITY OF DAYTON, OHIO.

HOUSING ORDINANCE.

"An ORDINANCE establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation."

* * * * *

Section 806-30. ENTRY AND INSPECTION of DWELLINGS.

(a) The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey.

(b) Every occupant of a dwelling shall give the owner thereof or his agent or employee access to any part of such dwelling or its premises at any reasonable hour for the purpose of making such repairs or alterations as are necessary to effect compliance with the provisions of this ordinance or any lawful order issued pursuant to the provisions of this ordinance.

(c) No officer, agent, or employee of the City of Dayton shall render himself personally liable for any damage

that may accrue to persons or property as a result of any act required or permitted in the discharge of his duties under this ordinance. Any suit brought against any officer, agent, or employee of the City of Dayton as a result of any act required or permitted in the discharge of his duties under this ordinance shall be defended by the City Attorney until the final determination of the proceedings therein.

* * * * *

Section 860-83. PENALTIES.

Any person who shall violate any provision of this ordinance shall, upon conviction, be punished by a fine of not less than twenty dollars ($20.00) nor more than two hundred ($200) or by imprisonment of not less than two (2) days nor more than thirty (30) days, or both, and each day of failure to comply with any such provision shall constitute a separate violation.

OPINION OF THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO.

May 21, 1957.

THOMAS, *J.*:

This matter is before the Court on the issue of whether or not the petitioner is illegally restrained of his liberty.

The plight of the petitioner grows out of an ordinance of the City of Dayton, Ohio, which said ordinance is designated "An ORDINANCE establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation.

The ordinance provides, among other things, that the owner or occupant of every dwelling, dwelling unit, rooming house and rooming unit shall give the housing inspector free access to such dwelling, dwelling unit, rooming house or rooming unit, and its premises, at any reasonable hour for the purpose of inspection, examination and survey.

The ordinance also provides that any person who shall violate any provision of this ordinance, upon conviction, shall be punished by a fine of not less than $20.00 nor more than $200.00, or by imprisonment of not less than two days nor more than thirty days, or both.

The petitioner refused to permit housing inspectors to enter his home on several different occasions without a search warrant, and pursuant to the penalty provision of the ordinance he was arrested by the Police Department of the City of Dayton, Ohio, for the violation of said ordinance, namely, refusing to allow a housing inspector to enter his private dwelling for the purpose of making an inspection of his premises.

After petitioner's arrest, his counsel filed a petition for a Writ of Habeas Corpus in the Common Pleas Court of Montgomery County, Ohio, and the writ was allowed. The case then came on for hearing upon the merits.

A most serious question is involved in this matter,—one that is highly controversial, primarily for the reason that there is a feeling in the hearts of most men that every man's house is his castle. This maxim is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.

The eloquent passage in Chatham's speech on General Warrants is familiar to many people:

"The poor man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."

On the other side of this question are those who believe that when any legislative body enacts a law under the label of police power, it becomes sacrosanct, and constitutional objections concerning same should be treated as technical rather than as real and legitimate.

As we enter and become involved in modern-day complex living conditions, laws and regulations unheard of and unknown a few years back are now becoming ostensibly necessary for the protection of the general public. The scope and effect of these laws naturally become debatable and academic as some go so far as to limit and restrict our established right. The ordinance in question is one of such laws which affects one of our natural rights.

One facet of the ordinance of the City of Dayton, Ohio, which has brought the petitioner before this Court comes directly in contact with the Fourth Amendment of the Constitution of the United States, and Section 14 of the Bill of Rights of the Constitution of the State of Ohio. They read as follows:

"AMENDMENT IV. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

"SECTION 14. SEARCH WARRANTS. The right of the people to be secure in their persons, houses

papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

In our search for authorities on our question, we have found only three cases in the United States that throw any direct illumination on this issue:

District of Columbia v. Little, 178 Federal, 2d, 13. United States Court of Appeals, District of Columbia Circuit, decided August 1, 1949.

This case involved Geraldine Little, who was convicted in the Municipal Court for the District of Columbia for interfering with an inspector of the Health Department in the performance of his duty by refusing to unlock the door of her home at the command of the inspector who was without a warrant.

The conviction was reversed on appeal to the Municipal Court of Appeals for the District of Columbia, 62 A. 2d 874, and the District appealed. The Court of Appeals, by two-to-one decision, affirmed the judgment of the Municipal Court of Appeals, construed the Fourth Amendment and held that it prohibited the inspector from entering defendant's home over her protest and without a warrant. The Syllabus in this case is as follows:

"1. Searches and seizures.

The Constitutional prohibition against unreasonable searches, by implication permits reasonable searches, but reasonableness without a warrant is adjudged solely by extremity of circumstances of the moment and not by any general characteristic of the officer or his mission.

2. Searches and seizures.

Except for the most urgent of necessities, the question of reasonableness of search is for a magistrate and not for enforcement officer.

3. Criminal law. Searches and seizures.

The provision of Fourth Amendment regarding searches precludes searches of homes by government officers without a warrant, regardless of whether officers are searching for evidence of crime or whether they are searching for something else, or just searching, and provision is not limited by Fifth Amendment that no person shall be compelled to be a witness against himself.

4. Searches and seizures.

The Fourth Amendment was a precautionary statement of the lack of federal power, coupled with a rigidly restricted permission to invade the existing right, and the guaranteed right already belonged to the people.

5. Searches and seizures.

The basic premise of constitutional prohibition against unreasonable searches was not protection against self-incrimination, but was the common law right of a man to privacy in his home.

6. Searches and seizures.

No matter who the officer is or what his mission, a government official cannot under the Fourth Amendment invade a private home, unless a magistrate has authorized him to do so, or an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate, and the right of privacy is not conditioned upon the objective or the prerogative or stature of the intruding officer.

7. Searches and seizures.

Under Fourth Amendment an officer may not enter a home without a warrant even if he has reasonable ground to believe that a person therein has commited a felony, unless compelling.

8. Searches and seizures.

The fact that a definite complaint had been made that defendant's home contained an accumulation of loose and uncovered garbage and trash in the halls, did not entitle inspector of Health Department to enter to make an inspection over defendant's protest and without a warrant.

9. Searches and seizures.

No difference between the words 'inspect' and 'search' exists in regard to the provision of Fourth Amendment prohibiting unreasonable 'searches' of homes, and inspector of Health Department was required under the amendment to obtain a warrant to 'inspect' defendant's home over defendant's protests.

10. Searches and seizures.

An act of Congress purporting to permit the invasion of homes by police officers without warrant, except under the established exception of unavoidable crisis, would be void under Fourth Amendment.

11. Searches and seizures.

Under the Fourth Amendment inspectors of Health Department without a warrant could not invade a private home to see that it was clean and wholesome, or to search for garbage upon a complaint that garbage was accumulated in hallways, or to see whether occupants had failed to avail themselves of toilet facilities therein.

12. Municipal corporations.

Municipal regulations which protect the public health, prevent nuisances and the like, applicable by

terms and practice to conditions infringing upon the public interest are valid.

13. Searches and seizures.

Fact that Congress in enumerating in statutes the articles or things for which search warrants could be issued in District of Columbia, did not refer to articles or things offending health laws, did not authorize inspector of Health Department to inspect a private home without a warrant and over protests of owner."

It should be noted that Judge Holtzoff, in his dissenting opinion, referred to the case of *Hubbell v. Higgins*, 148 Iowa, p. 36, which case involved the inspection of a hotel. The fourth paragraph of the syllabus of the case reads:

"The legislature in the exercise of its police power may provide for the inspection of hotels in the interest of public safety and health, and this right of inspection is a mere incident of such power, an exercise of which violates no constitutional guarantee against the right of entry upon private property and search without due process of law."

We do not believe this proposition of law has ever been questioned where any business has been licensed, but we do not know of any law that would compel one to seek a license to live in a private home.

A Writ of Certiorari was granted by the United States Court of Appeals on November 7, 1949, and the case was heard before the Supreme Court of the United States of America at the October Term 1949, and decision made February 20, 1950, in *District of Columbia v. Little*, 339 U. S. 1. The Court held:

(1) Respondent's mere refusal to unlock the door on substantial constitutional grounds was not the kind of interference prohibited by the regulation

(2) The foregoing conclusion makes it unnecessary to decide whether the Fourth Amendment forbade the health officer to enter respondent's home without a search warrant.

It should be pointed out that Justice Douglas took no part in the consideration or decision of the case, and that Justice Burton and Justice Reed dissented.

During our search for authorities, the legal staff of the City of Dayton, Ohio, gave the Court a decision which they believe substantiates and upholds their theory of this matter. It is—

Givner v. State of Maryland, Court of Appeals of Maryland, Decided July 12, 1956, reported in 124 Atlantic Reporter, 2d series.

This case is an example of what we have said previously, namely, that our question is highly controversial. The Maryland Court of Appeals sustained the validity of certain inspection ordinances of the City of Baltimore, Maryland,—not upon any judicial precedent, but upon a statement (not dictum) made by the Supreme Court of the United States in the *Little* case, to the effect that there were certain contentions advanced in support of uniform Municipal inspection ordinances without search warrants.

The Maryland Court merely stated it would follow one of the contentions:

"In these circumstances we consider the proposed inspections reasonable, and in our opinion the case falls within one of the intermediate constitutional contentions stated in the Little case under which 'municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants.'

> "We hold that such inspections are not unreasonable and hence are not unlawful. If we are correct in our view that the inspections here involved are not unreasonable, they do not involve any violation of the 14th Amendment."

In fact, the Maryland Court of Appeals adopts the minority view of the Supreme Court in the *Little* case. Mr. Justice Burton, in the dissenting opinion, said—

> "In my opinion, * * * the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as is required by the Fourth Amendment to protect the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

Factually, the Maryland case differs greatly from the *Little* case and the one at bar: the Maryland case arose out of an attempted inspection of an apartment building, while the *Little* case and the instant case arose out of attempted inspections of private residences.

It may be argued successfully that the Fourth Amendment is not binding on the States, however, we should not lose sight of the fact that the people of Ohio reserved for themselves the right to be secure in their homes by enacting Section 14, Article 1 of our Constitution, which is identical in meaning and form (with the exception of two words) to the Fourth Amendment of our federal constitution.

The proponents of ordinances which provide for the unlimited number of inspections of private homes, at reasonable hours, contend that the execution of these

ordinances does not violate the right to privacy in homes provision of the Constitution, for the reason that housing inspectors are not permitted to use force or violence in gaining admission into one's home, and the only difficulty and inconvenience that could befall one who would refuse to admit an inspector is that he merely goes to jail. Therefore, the whole arrangement is quite constitutional. This ingenious reasoning produces a distinction in methods employed, but without a difference in the end result.

We should be mindful that immunity from search and seizure is not from all search and seizure, but from search and seizure unreasonable in the light of common law traditions. Therefore, it would be safer for all legislative bodies to regard all searches as unreasonable which have hitherto been unknown to the law, leaving the parties and the public to the accustomed remedies.

It is true that present-day living conditions have brought about many problems which require the relinquishment of certain of our rights for the benefit of the greater number of our people, but just how far we are to go in this respect should be a matter of great concern, and should be approached slowly, cautiously and carefully.

As a part of our decision, we adopt and follow the law pronounced in—

District of Columbia vs. Little, 178 Federal (2d) 13, United States Court of Appeals, District of Columbia Circuit.

and we cannot overlook the statement made by the Supreme Court of the United States in reference to the conviction of Geraldine Little in the Municipal Court for the District of Columbia, for refusing to unlock the door

of her home at the behest of an inspector who was without a warrant. The last paragraph of the Supreme Court's decision is most dynamic and revealing. It reads—

> *"Had the respondent not objected to the officer's entry to her house without a search warrant, she might thereby have waived her constitutional objections. The right of privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than respondent did here. The judgment of the Court of Appeals affirming the Municipal Court of Appeals judgment setting aside the conviction is affirmed."*

In conclusion, we are of opinion and hold that petitioner's constitutional rights were not affected by the enactment of ordinances 806-30 to 806-63 of the general ordinances of the City of Dayton, Ohio, and that in refusing to admit housing inspectors he elected to exercise his constitutional objection.

This case is distinguishable from *Cogan v. City of Dayton, et al.*, decided by Judge Robert U. Martin, of this Court, in that our case involves a private home, while the *Cogan* case involved a rooming house operation amenable to the licensing provisions of the ordinances of the City of Dayton.

Therefore, the petitioner is ordered discharged from the custody of the Police Department of the City of Dayton, Ohio.

Counsel may prepare the proper entry.

ENTRY OF THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO.

This day came Paul J. Price, Chief of Police Department of the City of Dayton, Ohio, to whom a writ of habeas corpus was directed upon the application of Arthur T. Eaton, ex rel. Earl Taylor, and having with him the body of said Earl Taylor, together with said writ, and the day and cause of the caption and detention of said Earl Taylor as commanded in said writ; and thereupon the proofs and allegations of the parties being heard and considered upon the only issue raised by the parties, namely, the constitutionality of Section 806-30 of the Code of General Ordinances of the City of Dayton, Ohio, being ordinance No. 18099 as it applies to the factual situation in this case, the COURT FINDS that Section 806-30 is unconstitutional as it applies to the facts in this case as violative of the Fourth Amendment to the Constitution of the United States, and Article 1, Section 14 of the Constitution of the State of Ohio, and that the said Earl Taylor was within the privilege of his constitutional rights in refusing to grant housing inspectors free access to the dwelling he occupied, without a search warrant and without showing a most urgent necessity to enter the home he occupied; and it is therefore ordered that said Earl Taylor be and is hereby discharged from the custody of said Paul J. Price, Chief of Police Department of the City of Dayton, Ohio, and that he go hence without day and that the costs of this proceeding taxed at $ be paid by the County Treasurer on warrant of the County Auditor therefor, as provided by law.

Exceptions of defendant noted.

OPINION OF THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO.

(105 OHIO APP. 376.)

1. The rule that a writ of habeas corpus will not lie to test the constitutionality of an ordinance has no application where there has been no conviction of the person seeking his release from custody.
2. Where an ordinance is claimed to be unconstitutional the burden of showing the unconstitutionality is on the person making such claim.
3. Inspections conducted by the health department of a municipality are a valid exercise of the police power and are not an invasion of the constitutional rights of the occupant or owner of the building inspected.
4. A municipal ordinance, enacted pursuant to Section 715.26, Revised Code, which establishes minimum standards for dwellings, authorizes a housing inspector to make inspections of dwellings and "to enter, examine and survey at any reasonable hour" any dwelling, and provides that such housing inspector shall be given "free access to such dwelling * * * at any reasonable hour for * * * such inspection," and for penalties for violation thereof, is not arbitrary, discriminatory or unreasonable, is a valid exercise of the police power; the inspection contemplated by such ordinance is not an unreasonable search, and such ordinance does not violate the provisions of Section 14 Article I of the Ohio Constitution prohibiting "unreasonable searches."

WISEMAN, J. This is an appeal on questions of law from a judgment of the Common Pleas Court of Montgomery County discharging Earl Taylor, referred to throughout this opinion as relator [Arthur T. Eaton being erroneously named as relator in the caption of the case] from the custody of the respondent on a writ of habeas corpus.

The relator was arrested for unlawfully refusing "to permit a duly authorized agent of the Division of Housing Inspection of the city of Dayton to enter and survey the said premises for the purpose of repairs or alterations as are necessary to comply with the provisions of minimum housing standards" contrary to Section 806.30 of Ordinance No. 18099 of the city of Dayton.

The relator's testimony being uncontradicted, there is no dispute as to the facts. The relator and his wife have lived for 11 years in the residence in question, the record title being in the name of the wife. The house is strictly a private residence, which at the time in question was in a good, clean, safe and sanitary condition. No complaint had been filed with respect to the condition of the premises. The inspectors had been inspecting other houses in the block. The inspectors called several times at the residence of relator and sought entrance for the purpose of inspection. Upon learning that the inspectors had no search warrant, the relator refused them entrance. The arrest of the relator followed. After pleading "not guilty," the relator was incarcerated in the city jail in lieu of bond. He was released from jail by the Common Pleas Court of Montgomery County on a writ of habeas corpus. Upon hearing, he was discharged from custody, on the ground that the ordinance in question was unconstitutional and void, and that, therefore, the Municipal Court of Dayton had no jurisdiction.

Two errors are assigned: Error in passing on the constitutionality of the city ordinance in a habeas corpus proceeding; error in holding the inspection section (806-30) of the ordinance to be violative of the Fourth Amendment to the Constitution of the United States and Section 14, Article I of the Constitution of the state of Ohio.

There is a diversity of opinion on the question whether the constitutionality of an ordinance may be raised in a habeas corpus proceeding. In Ohio the minority rule prevails, which is stated in 26 Ohio Jurisprudence (2d), 566 Section 13, as follows:

> "In Ohio, it is expressly held that a writ of habeas corpus will not lie to test the constitutionality of a statute or ordinance, in favor of one who has been convicted thereunder, where the criminal court in which the conviction was obtained had jurisdiction to determine the question of constitutionality; in such case the writ of habeas corpus cannot be made the substitute for an appeal." (Cases cited.)

Also, a corollary to the above rule is stated on page 567, as follows:

> "Also, it has been held that the constitutionality of statutes and ordinances may be passed upon where the petitioner is under arrest but has not been tried and convicted, and the same rule obtains where the applicant is held for appearance before the proper court upon preliminary hearing." (Cases cited.)

The relator in the instant case has not been convicted. The matter is pending in the Municipal Court of Dayton on his plea of "not guilty." The rule urged by appellant has no application where there has been no conviction. This differentiation was not made in the case of *State, ex rel. Focke, v. Kirkpatrick*, 99 Ohio App., 131, 131 N. E. (2d), 591. We are required to follow the rule laid down by the Supreme Court in the cases referred to in the footnote in 26 Ohio Jurisprudence (2d), 566 and 567. The first assignment of error is not well made.

Is the ordinance of the city of Dayton constitutional? The grant of powers of local self-government is conferred

on municipalities by Section 3, Article XVIII of the Ohio Constitution, which provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

It is not contended that the ordinance is in conflict with general laws. On the other hand, it is contended that the ordinance was enacted in pursuance of specific statutes. Section 715.26, Revised Code, in part provides:

"Any municipal corporation may:

"(A) Regulate the erection of buildings and the sanitary condition thereof, the repair of, alteration in, and addition to buildings;

"(B) Provide for the inspection of buildings or other structures and for the removal and repair of insecured |insecure| buildings;"

"* * *"

Section 715.29, Revised Code, provides:

"Any municipal corporation may:

"(A) Regulate by ordinance the use, control, repair, and maintenance of buildings used for human occupancy or habitation, the number of occupants, and the mode and manner of occupancy, for the purpose of insuring the healthful, safe, and sanitary environment of the occupants thereof;

"(B) Compel the owners of such buildings to alter, reconstruct, or modify them, or any room, store, compartment, or part thereof, for the purpose of insuring the healthful, safe, and sanitary environment of the occupants thereof;

"(C) Prohibit the use and occupancy of such buildings until such rules, regulations, and provisions have been complied with."

The purpose of ordinance No. 18099 is stated in the preamble as follows:

"Establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation; establishing minimum standards governing the conditions and maintenance of dwellings, dwelling units, rooming houses and rooming units; fixing certain responsibilities and duties of owners, operators and occupants of dwellings, dwelling units, rooming and boarding houses and rooming units; requiring permits for the operation of rooming and boarding houses and establishing fees therefor; establishing a Bureau of Housing Inspection and establishing a Housing Appeals Board; fixing the power and duties of the Housing Inspector for administration and enforcement of the ordinance; authorizing the adoption of rules and regulations by the Housing Inspector to carry out the provisions and purposes of the ordinance; authorizing the inspection of dwellings, the rehabilitation of dwellings and the vacation and removal of dwellings unfit for human habitation; and providing penalties.

"Whereas, in the city of Dayton there are dwellings and rooming houses which are so dilapidated, unsafe, dangerous, unhygienic or insanitary as to constitute a hazard and menace to the health, safety, morals and welfare of the residents of such dwellings and rooming houses as well as of the people of the city of Dayton; now, therefore,

"Be it ordained by the Commission of the City of Dayton:"

Section 806-30 of said ordinance in part provides:

"(a) The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within

the city of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey."

Section 806.83 prescribes a penalty by way of fine or imprisonment for a violation of any provisions of the ordinance.

The relator refused on several occasions to permit housing inspectors to enter his home without a search warrant, although it is not disputed that the inspectors requested access at reasonable hours. Furthermore, it is conceded that no emergency existed.

Relator contends, and the lower court was in accord, that the ordinance exceeded the police power of the city by providing for inspection of a private dwelling against the will of the occupant and without a search warrant, and that the ordinance for that reason was in violation of the constitutional provisions in the federal and state Constitutions which prohibit "unreasonable searches."

The Fourth Amendment to the Constitution o. the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no warrants shall issue but upon probable cause, sup ported by oath or affirmation, and particularly de scribing the place to be searched, and the person o things to be seized."

The Fourth Amendment has no application to th states. *State v. Lindway*, 131 Ohio St., 166, 2 N. E. (2d 490. But the Ohio Constitution contains a similar pro vision. Section 14 of Article I of the Ohio Constitutio provides:

"The right of the people to be secure in their pe sons, houses, papers, and possessions, against unrea sonable searches and seizures shall not be violated and no warrant shall issue, but upon probable caus supported by oath or affirmation, particularly de scribing the place to be searched, and the person an things to be seized."

The right of the individual to be secure in his prop erty, unless good cause be shown to the contrary, ver early found a place in the Anglo-Saxon law, which ha been epitomized in the legal maxim—"Every man's hous is his castle." The legal principle stated in this maxim embodied in the above constitutional provision.

A new and controversial question is presented, whic is: Does the constitutional provision against unreasonab search limit the city of Dayton in the exercise of the poli power with regard to the right of inspectors to enter pr vate dwellings without a search warrant and against th will of the occupant?

This is a case of first impression in Ohio. After a car ful search only a few cases have been found in other jur dictions where the precise question presented here h been discussed or decided. In *District of Columbia v. Little*, 178 F. (2d), 13, 13 A. L. R. (2d), 954 (U. S. C.

District of Columbia, 1949), the accused was convicted in the Municipal Court for the District of Columbia upon an information which charged that on certain premises on a certain day she hindered, obstructed and interfered with an inspector of the health department in the performance of his duty. A reversal of the conviction by the Municipal Court of Appeals was sustained on an appeal to the United States Court of Appeals for the District of Columbia. In that case the evidence shows that the inspector was ordered by the health officer to make an inspection of the premises after a complaint had been made "that there was an accumulation of loose, and uncovered garbage and trash in the halls of said premises and that certain of the persons residing therein had failed to avail themselves of the toilet facilities." It was not disputed that the premises was a private residence, the home of the accused; that the inspector had no search warrant; that the accused refused to unlock the door; and that she was thereupon arrested. Every legal question raised in the case at bar is discussed by the court in the *Little* case, either in the majority opinion or in the dissenting opinion. The relator herein relies on the majority opinion in that case, and the respondent relies on the dissenting opinion. Quoting from A. L. R., the court, on page 958, states the question raised: Can a health officer of the District of Columbia inspect a private home without a warrant if the owner objects? We quote several paragraphs of the A. L. R. headnotes as follows:

> "1. Reasonable searches are, by implication, permitted by the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches and seizures.
>
> "2. The reasonableness of a search without a warrant is adjudged solely by the extremity of the cir-

cumstances of the moment and not by any general characteristic of the officer or his mission.

"3. Except for the most urgent of necessities, the question of reasonableness of a search is for the magistrate and not for the enforcement officer.

"* * *

"6. The Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches is a precautionary statement of a lack of federal governmental power as to a right already belonging to the people, coupled with a rigidly restricted permission to invade the existing right.

"7. The public importance of health laws and the beneficence and forbearance of health officers do not justify violation of the constitutional provision against unreasonable searches.

"8. A government official may not invade a private home without the authorization of a magistrate in the absence of an immediate major crisis in the performance of duty affording neither time nor opportunity to apply to a magistrate.

"* * *

"10. 'Inspection' of a home by a health officer is a 'search' thereof within the meaning of the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches.

"11. Although the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches and seizures was intended to forestall the use of general warrants, the amendment was not intended as a protection against general warrants alone.

"12. An act of Congress purporting to permit the invasion of homes by police officers without warrants except under the established exception of unavoidable crisis, is void as in violation of the Fourth Amend-

ment to the Constitution of the United States prohibiting unreasonable searches and seizures.

"13. Health officials may not, without a warrant and against the occupant's protest, invade a private home to investigate a complaint as to uncleanliness, the accumulation of garbage in the halls, and a failure of certain occupants to avail themselves of toilet facilities therein."

In the dissenting opinion Judge Holtzoff says:

(Page 21): "The Fourth Amendment does not ban all searches. It prohibits only those that are unreasonable.* * *".

(Page 22): "The Fourth Amendment was intended and is to be construed to apply only to criminal prosecutions and proceedings of a quasi-criminal nature for the enforcement of penalties.* * * It does not affect the administration of law if criminal prosecutions or suits for penalties are not involved. It does not apply to inspections, if no seizure is intended."

(Page 23): "The conclusion that the prohibitions of the Fourth Amendment are limited to proceedings of a criminal or penal nature, is supported by the fact that apparently the Congress has never enacted any statutes providing for the issuance of search warrants for any purpose other than the enforcement of the criminal law. The inference is clear that the legislative branch of the government has continuously construed the Fourth Amendment in the manner here indicated. While this consideration is not conclusive, it is nevertheless entitled to great weight in interpreting the Constitution. Specifically, there is no existing statute under which a health inspector, a plumbing inspector, or a building inspector may obtain a warrant authorizing him to enter a building for the purpose of a routine inspection. It has always been as-

sumed that no search warrant is necessary.* * * Moreover, even if an Act providing for such search warrants should be placed upon the statute books, how can an inspector make a showing of probable cause as a basis for the issuance of a warrant for the purpose of an ordinary, routine examination? Regular periodic inspections are conducted for the purpose of making certain that laws relating to sanitation and safety are being observed.* * *"

(Page 24): "If a search warrant were necessary for such recurring inspections, the requirement would amount to turning over the supervision of administration from the executive to the judicial branch of the government, which, as the Supreme Court has observed in the past, would be a source of mischief and is contrary to the philosophy of our form of government. The Constitution contemplates a tripartite division of government into three coordinate branches. It was not intended that the judicial branch should have supervisory control over the executive.* * *

"* * *

"* * * There is no judicial document known to the law that would confer authority merely to inspect premises for the purpose of ascertaining whether certain laws, such as those relating to public health and public safety, are being observed. Such scrutiny has always been conducted by properly authorized officers without the requirement of judicial sanction. In effect, the opinion of the court proposes to create a new type of process, unknown to the common law or to any statute, and to confer power on the judiciary, that it has never possessed, to supervise the performance of routine administrative duties."

The judgment in the *Little* case was affirmed by the Supreme Court of the United States in 339 U. S., 1, 94 L. Ed., 599, 70 S. Ct., 468. However, the Supreme Court

voided passing on the constitutional question. The syllabus is as follows:

"1. Respondent's mere refusal to unlock the door on substantial constitutional grounds was not the kind of interference prohibited by the regulation.

"2. The foregoing conclusion makes it unnecessary to decide whether the Fourth Amendment forbade the health officer to enter respondent's home without a search warrant."

The gist of the court's ruling is found on page 5, as follows:

"The officer had no search warrant. While he was standing outside the door, respondent returned. She protested the right of the inspector to enter her private home, claiming that his entry would violate her constitutional rights. She neither used nor threatened force of any kind. In view of these facts found by the courts below, the question boils down to whether respondent's mere refusal to unlock the door accompanied by remonstrances on substantial constitutional grounds was the kind of interference prohibited by the regulation. We hold that it was not."

Mr. Justice Burton wrote a dissenting opinion, in which Mr. Justice Reed concurred, as follows:

"If this Court is to interpret an ordinance of the District of Columbia, it seems to me that the action of the respondent was an effective interference with an inspector of the District Health Department in the performance of his official duties, and that such conduct of the respondent violated the ordinance that is before us. In my opinion, also, the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search

warrant as is required by the Fourth Amendment to protect the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."

In *Givner v. State*, 210 Md., 484, 124 A. (2d), 764 (Court of Appeals of Maryland, 1956), the court held that provisions of a city code of Baltimore imposing a penalty upon the owner or occupier of any house or dwelling who refuses to permit the health commissioner or chief engineer of the fire department, or their authorized representatives, from entering premises for the purpose of inspecting the same during daylight hours, to determine whether the structure complied with the safety provisions of the code, are not unconstitutional as authorizing search without a warrant. We quote from several paragraphs of the Atlantic (2d) headnotes as follows:

"Although Fourth Amendment of United States Constitution is not binding upon the states, in considering our own Constitution and statutes relating to the subject of unlawful searches and the admissibility of evidence thereby obtained, decisions of the United States Supreme Court on the similar Fourth Amendment are entitled to great respect.

"Attempted inspections by health commissioner, fire and building inspectors under ordinance authorizing their inspection of premises and imposing penalties upon owners or occupiers of such premises who refuse to permit their inspections was in exercise of police power."

"Municipal ordinances authorizing health, fire and building inspectors to enter upon premises during daylight hours, for the purpose of inspecting such premises to determine compliance with code provisions, and providing a penalty to the owner or occupier of premises who refuses to allow such inspec-

tions, were not unreasonable or unconstitutional as an authorization of an illegal search of the premises."

In that case the building which the officer attempted to inspect was not a private dwelling but a three-floor apartment house. In fact, the city ordinance excepted private residences from its operation. The building was defined in the ordinance as a "multiple dwelling." However, the court found that the defendant had expressly waived all defenses on technical grounds, including the defense that the ordinance excepted private dwellings from inspection. The Constitution of Maryland does not expressly provide against unreasonable searches and seizures. The court held that while the Fourth Amendment is not binding upon the states, due recognition would be given to decisions of the Supreme Court of the United States interpreting the Fourth Amendment. On the distinction between a search in a criminal case and in a civil matter, and whether the search is reasonable or unreasonable, the court on page 504 said:

"* * * In the instant case, if despite the fact that the Fourth Amendment is not applicable, the tests of reasonableness which are applicable under it should be applied under either Maryland law or the Fourteenth Amendment, a search for evidence to prove guilt of a crime would present a situation which we should regard as substantially different from that presented by an inspection for the purpose of protecting the public health or safety. True, the privacy of the home of an individual is invaded whatever may be the reason for the search; but in the one case the liberty of the individual is at stake and in the other the health and safety of the public. The latter are the objectives of the inspection in the present case."

Again, on page 505 the court said:

> "* * * we have the fact that these inspections are of a routine nature, are to be made at reasonable hours and are primarily for protective, not punitive purposes. In these circumstances, we consider the proposed inspections reasonable, and in our opinion the case falls within one of the intermediate constitutional contentions stated in the *Little* case under which 'municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants.' We hold that such inspections are not unreasonable and hence are not unlawful."

The question presented here has been discussed from the viewpoint of the absence of a search warrant. It is interesting to note the statutory law in Ohio with respect to search warrants. Sections 2933.21 to 2933.31, inclusive, Revised Code. Section 2933.22, Revised Code, provides:

> "A warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly *describing the place to be searched and the property and things to be seized.*" (Emphasis ours.)

What search warrants shall contain is set forth in Section 2933.24, Revised Code, which in part provides:

> "A warrant for search shall be directed to the proper officer * * * and particularly describe the things to be searched for, the house or place to be searched, and the person to be seized. Such warrant shall comand the officer to search such house or place for the property or other things, and to bring them together with the person to be seized, before the judge or magistrate. * * *."

These statutory provisions are found under Title XXIX [29] Crimes—Procedure, and the provisions of

the statutes are directed solely to criminal matters and have no application whatever to civil matters. In the instant case, there could be no seizure of a person or things as provided in the statute, and Section 14, Article I of the Ohio Constitution.

It will be observed that the constitutional provision prohibits "unreasonable searches." It is necessarily implied that there is no constitutional provision against reasonable searches.

However, in our opinion, the question presented should be determined on the basis of whether the ordinance is a valid or invalid exercise of the police power, rather than on the basis of whether a search warrant is or is not required.

The ordinance under consideration was enacted in pursuance to Section 715.26, Revised Code, above quoted, and, also, in pursuance to the police power conferred on municipalities by Section 3, Article XVIII of the Ohio Constitution. Police power is constantly in the process of evolution and development and must be adapted to the conditions of the times.

In 10 Ohio Jurisprudence (2d), 412, Section 335, the breadth of the police power is stated as follows:

> "The police power includes anything which is reasonable, necessary, and appropriate to secure the peace, order, protection, safety, good health, comfort, quiet, morals, welfare, prosperity, convenience, and best interests of the public."

In Section 336 at page 415, it is stated:

> "It may be said in a general way that the police power extends to all of the great public needs. Being based on the public safety, the public health and morals, and the general welfare, it is as broad as these conditions may require. The police power has

been described as the law of necessity and as being co-extensive with the necessities of the case and the safeguards of public interest. The measure or dimensions of police power available to the government are the measure or dimensions of public need, whether they apply to health, safety, protection, or general welfare, except as qualified by state and federal Constitutions.

"The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare."

In Section 338, on page 416, it is stated:

"The police power is not static and must ever be exercised in the light of changing conditions and the public needs. It is not circumscribed by fixed limits, but is capable of development and modification within certain limits, so that the powers of governmental control may be adequate to meet changing social, economic, and political conditions."

On page 445, in Section 369, it is stated:

"To be truly in the public welfare and thus superior to private property rights, legislation must confer upon the public benefits commensurate with its burdens upon private property. The benefits to society, reasonably to be expected, must not be out of proportion to the restraint imposed and the detriment inflicted on citizens by such restraint."

The limitations on the police power are discussed in Section 356 at pages 429 and 430. On page 430 it is stated:

"* * * it is subject to particular limitations namely: (1) the purpose of the statute, ordinance, or regulation must fall within the scope of the police power; (2) the act must be reasonably designed to accomplish this purpose; and (3) must not be arbitrary, discriminatory, oppressive or otherwise unreasonable."

In the application of these principles to the ordinance under consideration, we conclude that the ordinance falls within the scope of the police power, is reasonably designed to accomplish its purpose, and is not arbitrary, discriminatory or unreasonable.

The burden is on relator to show the unconstitutionality of the ordinance. In 10 Ohio Jurisprudence (2d), 227, Section 151, it is stated:

> "* * * the burden of showing the unconstitutionality of a statute or ordinance is upon the one challenging its validity. The proof of unconstitutionality must be clear and beyond a reasonable doubt."

The rule with respect to the power of the courts to review a legislative determination as to whether there has been a proper exercise of the police power is stated in 10 Ohio Jurisprudence (2d), Section 152, beginning at page 227, as follows:

> "The courts have power to review a legislative determination as to what is a proper exercise of the police power but such review is limited and courts are inclined to defer to the judgment of the state or municipal legislative body to which the matter is committed in the first instance, and will not interfere unless it is clear that the statute or ordinance has no real or substantial relation to the public health, morals, safety, or welfare, or is unreasonable or arbitrary, and infringes rights secured by the fundamental law.
>
> "It belongs to the General Assembly or other legislative body clothed with the police power to determine primarily what measures are appropriate or needful for the promotion of the objects of the police power.

"When legislation has a real and substantial r
lation to the prevention of conditions detrimental
the public health, morals, or safety, no matter ho
unwise the measure itself seems to individual judge
it is not for the judicial tribunals to nullify it upo
constitutional grounds. If the legislation bears a
reasonable relation to the public welfare and publ
morals the court may not declare it invalid. Unle
there is a clear and palpable abuse of power, a cou
will not substitute its judgment for legislative di
cretion. Local authorities are presumed to be famili
with local conditions and to know the needs of th
community. They are in a better position than th
courts to judge the public need and must be allowe
a considerable latitude of discretion."

Inspections conducted by the health department
the state or a municipality have been accepted as a val
exercise of the police power and have not been considere
an invasion of the constitutional rights of the occupant
the building inspected. 26 Ohio Jurisprudence (2d), 71
Section 42.

After giving due consideration to the rulings in th
cited cases and the applicable principles of law, we are
the opinion that in the instant case the inspection is
routine matter; it is to be made during reasonable hou
and is primarily for protective and not punitive purpose
and is in the interest of the general welfare. The i
spection contemplated by the ordinance is not an "u
reasonable search" within the meaning of the provisi
prohibiting "unreasonable searches and seizures" in S
tion 14 of Article I of the Ohio Constitution. The p
vision with respect to inspection is a valid exercise of
police power and does not violate the constitutional rig
of the relator.

Judgment reversed and cause remanded

HORNBECK, P. J., concurs.

CRAWFORD, J., dissenting. Those who framed the Fourth Amendment to the Constitution of the United States and those who adopted it almost verbatim in Section 14 of Article I of the Constitution of Ohio could hardly have intended to protect only those suspected of crime by requiring a warrant, while the ordinary citizen might still be compelled, at the risk of fine and imprisonment, to open his private dwelling at any hour of the day or night which a municipal housing inspector without a warrant might decide was "reasonable."

> "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." *District of Columbia v. Little*, 178 F. (2d), 13, 17, 13 A. L. R. (2d), 954.
>
> "There is no doctrine that search for garbage is reasonable while search for arms, stolen goods or gambling equipment is not." *Idem.* 16.

Section 14 of Article I of the Constitution of Ohio, like the Fourth Amendment to the federal Constitution, contains two separate and distinct clauses:

> "The right of the people to be secured in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

The first clause creates nothing new. It preserves an existing fundamental right. The second clause limits and circumscribes the one recognized exception to that right. The privilege claimed by the city would destroy the right, and nullify the first clause.

There can be no serious doubt that the true purpose of these constitutional provisions was not to shield the actual or suspected felon, but to keep inviolate the sacred right described at the beginning, "The right of the people to be secure in their persons, houses," etc. Any exception should be strictly construed. 10 Ohio Jurisprudence (2d), 138, Constitutional Law, Section 37.

> "* * * to say that the specific prohibition of one threatened violation of a basic right thereby validates every other violation of that right is both illogical and unrealistic." *District of Columbia v. Little*, *supra* (178 F. [2d], 13), 19.

While the word, "inspection," as used in the ordinance is perhaps broader and potentially more objectionable than the word, "search," as found in the Constitution, we need not indulge in fine distinctions, inasmuch as interpretation should always be liberal in favor of the citizen. 10 Ohio Jurisprudence (2d), 137, Constitutional Law, Section 37.

It is complained that the requirement of a search warrant would be inconvenient and impractical for the purposes of housing inspection. The Constitution has often been found inconvenient. But if a search warrant is the only constitutional method provided whereby the city might pursue its purpose, it must either procure one upon demand or forego the "inspection." Relator was, therefore, entirely within his rights to refuse admittance to one without a warrant.

Lack of statutory authority for a search warrant for such an inspection certainly does not justify proceeding without one.

> "It is untenable to argue that because Congress has failed to provide procedure for obtaining a search warrant, searches otherwise unconstitutional can

therefore be made." *District of Columbia v. Little, supra* (178 F. [2d], 13), 20.

It is possible that the right in question may be subject to further definition and even to some reasonable limitation in the public interest, but if so, this can properly be accomplished only by the careful and regular processes of legislation and adjudication, and must not be entrusted to the personal views of an inspector.

In the *Little* case, at page 16, it is said:

"* * * except for the most urgent of necessities, the question of reasonableness is for a magistrate and not for the enforcement officer."

Under the present provisions of this ordinance the citizen must act at his peril. Either he must keep the doors of his dwelling open during all hours that the inspector thinks are reasonable or he must risk fine and imprisonment if his own judgment of the matter is in error. It is small comfort that in his trial as an accused defendant the court will then have a belated opportunity to pass upon the question and decide whether his conduct has been criminal.

Extensive as is the police power, and elastic as it must be to serve our developing economy, it is not absolute or unlimited. Measures enacted under it must still be reasonable, not only in their substantive provisions, but also in the means provided for their administration and enforcement. 10 Ohio Jurisprudence (2d), 454, 455, Constitutional Law, Sections 376, 377.

And they must not needlessly infringe private rights. 10 Ohio Jurisprudence (2d), 446, Constitutional Law, Section 371.

It is conceded that the question before us is new and controversial. The very lack of authority on the point is

mute but eloquent testimony that not until recently have municipalities presumed to enter private dwellings in the manner and for the purpose here involved.

The case of *Richards v. City of Columbia*, 227 S. C. 538, 88 S. E. (2d), 683, furnishes no precedent, for the court there observed:

> "* * * this question is not presented * * * because there has been no entrance of any premises by the director over the objection of the occupant."

In *Givner v. State*, 210 Md., 484, 124 A. (2d), 764, the right of entry was upheld, but in the absence of any comparable constitutional provision. And that court expressed doubt that the provisions of the Fourth Amendment against unreasonable searches and seizures could be regarded as limited to criminal prosecutions.

The only direct and authoritative decision on the question, that in *District of Columbia v. Little, supra* (178 F. [2d], 13), in the Court of Appeals for the District of Columbia, stands unreversed. It was affirmed by the United States Supreme Court on other grounds. 399 U. S. 1, 94 L. Ed., 599, 70 S. Ct., 468. Hence we cannot know whether a majority of the Supreme Court was inclined to agree or disagree with the court below on the constitutional question. But they did two significant things: They commented upon the grave importance of the question, and they declined to reverse.

The telling language of the majority of the Court of Appeals in the *Little* case seems grounded upon compelling logic.

That court also suggested that appropriate legislation might be devised to provide an adequate and appropriate method of inspection in the public interest without violating the rights of the individual citizen.

I apprehend that whenever a real public need is made apparent there will be few objectors, and that if those few were accorded a hearing with at least ultimate resort to the courts, no vital program would be seriously impeded, the most objectionable features of the ordinance would be removed, and even conflict with the Constitution might possibly be avoided.

But the burden now imposed by the ordinance upon the householder violates his constitutional right to be secure in his house; and its sweeping provisions for inspection exceed the police power of the municipality. For this two-fold reason the inspection and penal provisions of the ordinance are in my opinion unconstitutional and invalid.

The judgment of the trial court should be affirmed.

ENTRY OF THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO.

This matter came on to be heard as an appeal on questions of law from a judgment of the Court of Common Pleas ordering the discharge of Earl Taylor from the custody of the respondent Chief of Police, and the same was duly submitted.

The Court finds that Section 806-30 of the Housing Code of the City of Dayton, as enacted by Ordinance No. 18099, is in all respects reasonable and valid and within the police power of the City of Dayton; that the inspection provisions of said ordinance as enacted by Section 806-30 of the Code of General Ordinances of the City of Dayton are not violative of the Fourth Amendment to the Constitution of the United States nor of Section 14 of Article I of the Constitution of Ohio, forbidding unreasonable

searches and seizures, and that accordingly the judgment of the Court below in so holding was in error, is contrary to law, and should be reversed.

It is accordingly ORDERED AND ADJUDGED that the said judgment of the Court of Common Pleas be and the same hereby is reversed, and that a mandate issue to the Clerk of the Court of Common Pleas to carry this judgment into execution. Exceptions of the relator are hereby noted and costs awarded to the respondent.

OPINION OF THE SUPREME COURT OF OHIO.

(168 Ohio St. 123.)

1. Under the authority granted by Sections 715.26 and 715.29, Revised Code, a municipal corporation may "provide for the inspection of buildings or other structures and for the removal and repair of insecured buildings," and "regulate by ordinance the use, control, repair, and maintenance of buildings used for human occupancy or habitation," and "compel the owners of such buildings to alter, reconstruct, or modify them * * * for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof," and "prohibit the use and occupancy of such buildings until such rules, regulations, and provisions have been complied with."

2. An ordinance establishing minimum standards "governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation;" and "governing the conditions and maintenance of dwellings," and containing a provision which authorizes a housing inspector to make inspections of "dwellings, dwelling units, rooming houses, rooming units and premises located within

the city" and which also authorizes such inspector "upon showing appropriate identification * * * to enter, examine and survey at any reasonable hour all dwellings" and which requires that the "owner or occupant of every dwelling" shall give such inspector "free access to such dwelling * * * at any reasonable hour for the purpose of such inspection, examination and survey," with penalties of fine or imprisonment or both for violation of such provision, is not violative of Section 14 of Article I of the Ohio Constitution prohibiting unreasonable searches and seizures.

(Decided June 18, 1958.)

APPEAL from the Court of Appeals for Montgomery County.

On March 20, 1957, one Earl Taylor was served by a police officer with an instrument, captioned "Affidavit and Warrant," issued out of the Dayton Municipal Court. The affidavit, sworn to and signed by one George Cooper on March 19, states that "on or about the 12 day of March A. D. 1957 * * * Earl Taylor being the owner of premises located at 130 Henry Street, did unlawfully refuse to permit a duly authorized agent of the Division of Housing Inspection of the City of Dayton, to enter and survey the said premises for the purposes of repairs or alteration as are necessary to comply with the provisions of minimum housing standards contrary to the form of the ordinances to wit: Section 806.30 of Dayton, Ohio * * *."

It appears from the record that Taylor had previously received a notice from the office of the Prosecutor in the criminal division of the Dayton Municipal Court, dated March 12, notifying him to appear at that office on March 19, 1957, to answer a complaint made against him for refusing entry for housing inspection, to which notice Taylor did not respond.

When served with the affidavit and warrant he was not physically placed under arrest but was ordered to appear in Municipal Court on March 26. On that day he appeared in court, entered a plea of not guilty and, bond having been fixed in the sum of $1,000, was placed in the city jail. Late in the afternoon of the same day a writ of habeas corpus was sought in the Common Pleas Court of Montgomery County against the Chief of Police of Dayton on the application of Arthur T. Eaton to produce the body of Taylor, at which time he was released on his own recognizance by order of the court, and the matter was set for hearing on April 8.

Following the hearing, the writ was allowed on May 26, 1957, and Taylor was discharged from custody, the court finding in its entry that "Section 806.30 of the Code of General Ordinances of the City of Dayton, Ohio, being ordinance No. 18099 * * * is unconstitutional as it applies to the facts in this case as violative of the Fourth Amendment to the Constitution of the United States and Article I, Section 14 of the Constitution of the State of Ohio."

An appeal on questions of law was taken by the City Attorney of Dayton, representing the Chief of Police, from the judgment of the Common Pleas Court to the Court of Appeals, which court, with one judge dissenting, reversed the judgment of the trial court and remanded the cause.

It is now before this court on an appeal as of right and upon the allowance of a motion to certify. Further facts as required are stated in the opinion.

HERBERT, J. In the case of *State, ex rel. Smilack, v. Bushong, Supt.*, 93 Ohio App., 201, 112 N. E. (2d), 675 (affirmed by this court in 159 Ohio St., 259, 111 N. E. [2], 918), Guernsey, J., stated at the outset of the opinion:

"The cause is incorrectly captioned as it is not brought upon the relation of the state of Ohio and should be captioned 'In the Matter of the Petition for a Writ of Habeas Corpus by Oscar Smilack.' "

Although not pertinent to the issue here, we certainly approve of the principle embodied in the foregoing quoted statement. The incorrectness of the caption in the *Smilack* case is further compounded here in that Taylor's attorney, Eaton, is designated as relator. However, reference hereinafter to the relator will be intended to mean Taylor and not Eaton.

Condensing the assignments of error, relator contends that Section 806-30 of the Code of General Ordinances of the City of Dayton, being a part of ordinance No. 18099, is violative of the Fourth Amendment of the Constitution of the United States and of Section 14 of Article I of the Ohio Constitution. The question of whether this ordinance—or, for that matter, any statute of the state of Ohio—is violative of the Fourth Amendment of the Constitution of the United States is settled and disposed of in the first paragraph of the syllabus in the case of *State v. Lindway*, 131 Ohio St., 166, 2 N. E. (2d), 490, which states:

"1. The Fourth and Fifth Amendments to the Constitution of the United States, prohibiting unreasonable searches and seizures and compulsory self-incrimination, are directed exclusively against the activities of the federal government and have no application to the various states and their agencies."

Section 14 of Article I of the Ohio Constitution is almost the same verbatim as the federal constitutional provision and states:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated;

and no warrant shall issue, but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

Section 806-30, which the relator is charged with violating, provides in part:

"The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the city of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey."

Section 806-83 fixes a penalty of a fine of not more than 200 dollars or imprisonment for not more than 30 days, or both, for the violation of any provision of ordinance No. 18099. This ordinance, of which these sections are a part, was passed in November 1954. The caption states:

"An ordinance establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation; establishing minimum standards governing the conditions and main-

tenance of dwellings * * *; fixing certain responsibilities and duties of owners, operators and occupants of dwellings * * *; establishing a Bureau of Housing Inspection and Slum Prevention in the Division of Building Inspection and establishing a Housing Appeals Board; fixing the powers and duties of the Housing Inspector for administration and enforcement of the ordinance * * *; authorizing the inspection of dwellings, the rehabilitation of dwellings and the vacation and removal of dwellings unfit for human habitation; and providing penalties."

The preamble states:

"Whereas, in the city of Dayton, there are dwellings and rooming houses which are so dilapidated, unsafe, dangerous, unhygienic or insanitary as to constitute a hazard and menace to the health, safety, morals and welfare of the residents of such dwellings and rooming houses as well as of the people of the city of Dayton * * *."

By the ordinance, Sections 806-27 to 806-83, both inclusive, were added to the Code of General Ordinances of the City of Dayton. In Section 806-28 the Bureau of Housing Inspection and Slum Prevention in the Division of Building Inspection was created under the supervision of a Chief Housing Inspector.

Section 806-31 provides:

"Whenever the Housing Inspector determines that there has been a violation of any provision of this ordinance he shall give notice of such violation to the person or persons responsible therefor and order compliance with the ordinance, as hereinafter provided. Such notice and order shall:

"(a) Be put in writing on an appropriate form;

"(b) Include a list of violations, refer to the section or sections of the ordinance violated and order

remedial action which, if taken, will affect compliance with the provisions of this ordinance;

"(c) Specify a reasonable time for performance;

"(d) Advise the owner, operator or occupant of the procedure for appeal;

"(e) Be served upon the owner, occupant or agent in person provided, however, that such notice and order shall be deemed to be properly served upon such owner, occupant, or agent if a copy thereof is sent by registered mail to his last known address and a copy is posted in a conspicuous place in or on the dwelling affected."

Section 806-32 provides for an appeal from any notice and order given under the provisions of the preceding section to the Housing Appeals Board, created under Section 806-33, by filing a written petition with such board within ten days after receipt of the notice and order appealed from, and for a hearing thereon.

Section 806-32 further provides:

"(b) After a hearing, the Housing Appeals Board shall sustain, modify or withdraw the notice and order by majority vote, depending upon its findings as to whether the provisions of this ordinance have been complied with, and the petitioner and the Housing Inspector shall be notified in writing of such findings.

"* * *

"(d) The proceedings at such hearings, including the findings and decision of the Housing Appeals Board and reasons therefor shall be summarized and reduced to writing and entered as a matter of public record in the office of the Housing Inspector. Such record shall also include a copy of every notice and order issued in connection with the matter."

Because of the importance of the constitutional question here and its apparent novelty so far as Ohio is concerned, these pertinent provisions are set forth at length in order to present a complete picture of the steps provided for in housing inspections under the ordinance. Subsequent provisions deal in detail with requirements as to sanitary units, electrical outlets and fixtures, minimum heating facilities, floor space of dwelling units, and other related matters not involved here.

With respect to Section 806-30, it was testified by Taylor in the Common Pleas Court that inspectors came to his home on three occasions, each time at a reasonable hour, and that he denied them admission on each occasion. The relator has been a plumber for many years and showed in his testimony that he was familiar with plumbing and electrical inspections. Illustrative of his testimony is the following excerpt:

"Q. Did they have a search warrant? A. No, sir, they didn't. * * * Then the second time the fellow came out he entered the same way, came up like that, and then he called me on the telephone, wanted to know if he could come to my house and inspect the inside of the house. I said, 'Who are you, anyway?' He said, 'I am the building inspector,' or the housing inspector, and I said, 'Well, I don't see what right that you got coming into my house. Until you show me in writing, or some kind of facts, that you got a right to come into my house and inspect the house, I will not let you in.' And I said, 'Furthermore, I know the building inspectors and I know the plumbing inspectors, the electric inspectors and all the rest of them.' I said 'I work at this business and I come in contact with them off and on, and as far as you coming in,' I said 'You can't come in.' * * *

"* * *

"* * * A. The last time they was there a colore fellow and a white fellow, they came up to the doo and I walked out there, and he said, 'Mr. Taylor?' said, 'Yes, sir.' He showed, like a picture, he had picture on a piece of paper, he held it in his hand a stuck it back in his pocket. He said the housing i spector wanted to inspect your house.' I said, 'Wh do you have in there that you want to inspect?' I sai 'I have nothing in my house for inspection.' H said, 'We have a right to come in your house, through your house, inspect the whole inside of yo house.' I said, 'You have nothing wrote down paper. You don't have a thing to show me you a going to come in there to inspect anything, and far as that goes you aren't coming in unless you ha a search warrant to get in.'

"Q. Did he have a search warrant? A. No, sir.

"Q. Did he ever come back with a search wa rant? A. No, sir. And, furthermore, he said, you ain't going to let us in, we are entitled to get i and if you don't let us in' he said, 'I am going to lea it up to the Prosecutor.' I turned around and said, don't care what you do. You aren't coming in.' walked over and got in his car and that was the e of it."

Section 3 of Article XVIII of the Ohio Constituti authorizes municipalities "to adopt and enforce with their limits such local police, sanitary and other simil regulations, as are not in conflict with general laws Under the authority granted by Sections 715.26 a 715.29, Revised Code, a municipal corporation may "pr vide for the inspection of buildings or other structur and for the removal and repair of insecured building and "regulate by ordinance the use, control, repair, a maintenance of buildings used for human occupancy habitation," and "compel the owners of such buildings alter, reconstruct, or modify them * * * for the purp

of insuring the healthful, safe, and sanitary environment of the occupants thereof," and "prohibit the use and occupancy of such buildings until such rules, regulations, and provisions have been complied with."

It is not contended that the ordinance under consideration here is in conflict with any statutory enactment. The issue raised is that the city of Dayton, in the exercise of this police power, has violated the constitutional provision against unreasonable search and seizure.

Many decisions and able opinions have been written during the last two centuries covering this general subject of search and seizure, even going back into early English cases, but there is a paucity of authorities covering the precise point raised here. It seems to have been taken for granted throughout the United States that inspections of buildings, including dwellings, under reasonable regulations did not constitute "unreasonable search and seizure" in the constitutional sense, until the case of *District of Columbia v. Little*, 178 F. (2d), 13, 13 A. L. R. (2d), 954, was decided in 1949 by the United States Court of Appeals for the District of Columbia. In that case the court, by a two to one decision, held that an inspector of the Health Department of the District of Columbia was not entitled to enter the home of Little to make an inspection over her protest and without a warrant. In the opinion, Prettyman, J., set forth the facts and pertinent regulation of the District. The regulation read in part:

> "(2) It shall be the duty of every person occupying any premises * * * to keep such premises or part * * * clean and wholesome. If upon inspection by the Health Officer or an inspector of the Health Department, it be determined that any such part thereof * * * is not in such condition as herein required, the occupant * * * of such premises or part,

or the owner thereof * * * shall be notified and required to place same in a clean and wholesome condition; and in case any person shall fail or neglect to place said premises or part in such condition within the time allowed by said notice, he shall be liable to the penalties hereinafter provided.

"* * *

"(10) That the Health Officer shall examine or cause to be examined any building supposed or reported to be in an unsanitary condition, and make a record of such examination * * *

"* * *

"(12) That any person violating, or aiding or abetting in violating, any of the provisions of these regulations, or interfering with or preventing any inspection authorized thereby, shall be deemed guilty of a misdemeanor, and shall, upon conviction * * *"

The looseness and vagueness of the District of Columbia regulation should be noted as compared with the provisions of the Dayton ordinance quoted herein.

With all due respect for the majority opinion in the *Little* case, this Court is persuaded more by the reasoning set forth in the dissenting opinion by Holtzoff, J. When that case was appealed to the Supreme Court of the United States, Mr. Justice Black rendered the opinion of the court in 339 U. S., 1, 94 L. Ed., 599, 70 S. Ct., 468. The opinion states (at page 3):

"Neither the facts of this case, nor the District law on which the prosecution rests, provide a basis for a sweeping determination of the Fourth Amendment's application to all these varied types of investigations, inspections and searches. Yet a decision of the constitutional requirement for a search in this particular case might have far-reaching and unexpected implications as to closely related questions no

now before us. This is therefore an appropriate case in which to apply our sound general policy against deciding constitutional questions if the record permits final disposition of a cause on nonconstitutional grounds. See *Rescue Army v. Municipal Court*, 331 U. S., 549, 568-575, and cases there cited. Applying this policy, we find it unnecessary to decide whether the Fourth Amendment required a search warrant here. For even if the Health Officer had a lawful right to inspect the premises without a warrant, we are persuaded that respondent's statements to the officer were not an 'interference' that made her guilty of a misdemeanor under the controlling District law."

Mr. Justice Burton, with whom Mr. Justice Reed concurred, wrote a cogent dissenting opinion in which he stated:

"In my opinion, also, the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant as is required by the Fourth Amendment to protect the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."

We do not have, therefore, a decision of the United States Supreme Court as to whether in federal jurisdictions a housing inspection may lawfully be made without a search warrant, if such is demanded.

The topic of municipal housing codes has recently been considered in several law review articles. The following is from 69 Harvard Law Review (1956), 1115:

"* * * Traditionally, cities have regulated area use patterns through zoning ordinances, have set

standards for new construction and installations in building, plumbing, and electrical codes, and have required safety features in buildings used by the public. However, since World War II at least 50 cities, generally under the authority of city charters or state enabling legislation, have adopted housing codes designed for comprehensive and effective regulation of occupancy and facilities in existing housing. The enactment of new housing codes has been encouraged by provisions in Title III of the federal Housing Act of 1954, under which federal aid for local slum clearance projects is conditioned on the existence in the locality of 'a workable program' for the prevention and elimination of slums. * * *"

(Page 1125): "The power of the inspector to examine private homes for possible violations which may result in imposition of criminal penalties has raised the question whether he may demand entry without presentation of a court order. Although some codes require the inspector to obtain a court order if he is denied access (Footnote—see *e. g.* Denver, Colorado Housing Code Ordinance No. 27, Section 8-1944.), many codes apparently require occupants to admit inspectors without a warrant. However, in *District of Columbia v. Little* (178 F. [2d], 13 [D.C. Cir. 1949], affirmed on other grounds, 339 U. S. 1 [1950]), the Fourth Amendment was held to require that an inspector procure a warrant when refused entry, and this result, although making occasional inconveniences for inspecting teams, seems justifiable since the protection of community health would not seem to necessitate a greater infringement of individual privacy than does protection against crime. As it is unlikely that the typical occupant will exercise his constitutional right to refuse entry and thereby risk alienating the inspecting officer, the *Little* case probably does not in practice present a major obstacle to enforcement of housing codes."

This seems to be the only article extant which expresses that view.

Following the *Little* case, *supra*, the Supreme Court of South Carolina had before it the constitutionality of a municipal ordinance directed at the improvement of housing. In the case of *Richards v. City of Columbia*, 227 S. C., 538, 88 S. E. (2d), 683, the court, in a three to two decision, upheld the constitutionality of the ordinance (with the exception of certain provisions not pertinent here), although, with respect to the question of entry upon premises, the majority opinion states (page 556):

> "* * * this question is not presented in this litigation because there has been no entrance of any premises by the director over the objection of the occupant.* * * It may be added that there is doubt whether such an entrance would come within the constitutional guaranties against unreasonable searches."

The court then referred to the divided opinions in the United States Court of Appeals and in the Supreme Court in the *Little* case, *supra*.

Although it may be argued that that decision is obiter dictum with respect to this particular point, at least the court expressed its view and held valid the provision of the ordinance of the city of Columbia relating to inspections.

In *Givner v. State*, 210 Md., 484, 124 A. (2d), 764, the Court of Appeals of Maryland, in a decision rendered in July 1956, held that municipal ordinances, authorizing health, fire and building inspectors to enter upon premises during daylight hours for the purpose of inspecting such premises to determine compliance with code provisions and fixing a penalty as to the owner or occupier of premises who refused to allow such inspections, were not unreasonable or unconstitutional as an authorization of an illegal search of the premises.

Those three cases, *Little*, *Richards* and *Givner*, seem to be the only reported cases in which the issue of inspections without search warrants was considered. The decision of the *Little case*, of course, lacks Supreme Court affirmation on the constitutional question, whereas the decision in the *Richards* case may perhaps only be considered persuasive on the question of entry without a warrant for inspection. The *Givner* case, however, is squarely in point.

An article in 25 George Washington Law Review (October 1956), 1, discusses that case and is helpful in its discussion of housing codes and related problems generally. Because it is so timely and appropriate to the problem here, excerpts are quoted from it as follows:

> (Page 1) "Of all the complex and stubborn problems confronting the cities of our nation, that of urban blight is the most baffling and at the same time the most insidious.* * *"
>
> (Page 3): "A comprehensive program of urban renewal offers a solution for the menace of urban blight. This was the conclusion, concurred in by the President and the Congress, of the President's Advisory Committee on Government Housing Policies and Programs. Urban renewal encompasses rehabilitation and conservation of areas worth saving as well as clearance and redevelopment of areas too deteriorated to be salvable. The term 'urban renewal' was incorporated in the federal law (and later in state statutes) with the enactment of the Housing Act of 1954 which authorized for the first time federal aid for urban renewal projects of local communities."
>
> (Page 4): "An urban renewal program, to be effective, must be undergirded by an effective program of enforcement of adequate police power measures relating to housing, building, zoning and community planning, and must operate in an atmosphere of public understanding and affirmative support of the citizenry.* * *"

(Page 10): "In general, a housing code establishes minimum requirements respecting the condition, the maintenance and the occupancy of dwellings and the condition and maintenance of utilities and facilities in dwellings to the extent deemed necessary to achieve safety, health and general welfare objectives. Housing codes prescribe regulatory measures for the maintenance, occupancy and supplied facilities of structures and are concerned primarily with health, safety and sanitation requirements of buildings after they have been constructed.* * *"

(Page 16) "The police power is not exerted solely to protect the public health, the public safety or the public morals; it is not confined only to the suppression of the offensive, the insanitary or the disorderly. It encompasses the authority to cope with prevailing conditions for the purpose of serving the public welfare. (Footnote—*Bacon v. Walker*, 204 U. S., 311, 318 [1907]. In *Adler v. Deegan*, 251 N. Y., 467, 116 N. E., 705, 711 [1929], Justice Cardozo said of the New York Multiple Dwelling Act enacted in 1929, 'The end to be achieved is more than the avoidance of pestilence or contagion. The end to be achieved is the quality of men and women.* * * If the moral and physical fibre of its manhood and its womanhood is not a state concern, the question is, what is?' * * *)"

(Page 29): "An opinion rendered in July 1956 by the Maryland Court of Appeals in the case of *Givner v. Maryland* contains a timely discussion of the legal aspects of the right of entry under certain Baltimore city codes. In that case, in conformity with the Baltimore city plan, inspectors representing the Commissioner of Health, the Buildings Inspection Engineer, and the Chief Engineer of the Fire Department, accompanied by an electrical inspector and a uniformed policeman, visited the premises of the appellant and asked permission to enter to make an

inspection of the premises under the Baltimore city codes. The appellant refused the right of entry to the city's inspection team and thereafter in criminal court he was found guilty of violating three code provisions relating to inspection of buildings and was given a suspended sentence of $50 fine and costs.

"The appellant appealed, attacking the ordinances upon the ground that they authorized unlawful searches. In affirming the judgment, the Court of Appeals determined that the inspections involved are not unlawful and do not involve any violation of the Fourteenth Amendment. The court asserted that prohibitions against unreasonable searches and seizures do not bar *reasonable* searches and seizures, citing *United States v. Rabinowitz* [339 U. S., 56, 94 L. Ed., 653, 70 S. Ct., 430]. The proposed inspections, the court stated, were reasonable, pointing out they were primarily for protective, not punitive, purposes."

(Page 31): "Although some housing codes require the inspector to obtain a court order if he is denied access, many codes apparently require occupants to admit inspectors without a warrant. Where the inspections are to be made at reasonable hours under circumstances clearly showing that the inspections are not to be used to cover a search for violations of criminal law, it would appear that their authorization without a search warrant will not be in contravention of either the Fourteenth Amendment or state constitutional provisions comparable to the Fourth Amendment. The issue is that of personal privacy as against the protection of the public health and safety."

The last sentence quoted above restates in another way the problem which confronts this Court.

If the relator had permitted the Housing Inspector to enter, examine and survey at a reasonable hour as requested, it does not even follow that Section 806-31 would have been invoked. Had the inspection disclosed com-

pliance with the ordinance, no notice of violation would have been given. Had a notice of violation been given, the relator would have had available the provisions of Section 806-32 for an appeal to the Housing Appeals Board and a hearing before it. In the event of a final notice of violation and order, we must look further with respect to the powers and duties of the Housing Inspector.

Section 806-34 provides:

"Where a notice of violation and order to comply has been served pursuant to Section 806-31 C. G. O. and, upon reinspection at the end of the time specified for compliance and if no petition for a hearing has been filed, it is found that the violation or violations have not been remedied, the Housing Inspector may order the dwelling, or parts thereof affected by the continued violations, vacated in accordance with the following procedure:

"(a) Dwellings shall be vacated within a reasonable time not to exceed 60 days.

"(b) Vacated dwellings shall have all outer doors firmly locked and basement, cellar and first story windows barred or boarded to prevent entry.

"(c) Vacated dwellings shall not again be used for human habitation until written approval is secured from the Housing Inspector.

"(d) If a dwelling or part thereof is not vacated within the time specified in such vacation order the Housing Inspector shall seek a court order in a court of competent jurisdiction for the vacation of such dwelling or part thereof."

Although this section is not involved here, it should be noted that after a reinspection and order to vacate as provided therein the Housing Inspector must then obtain a court order for the vacation of the dwelling involved if the owner or occupant does not comply. Likewise, it is also

apparent that prosecution under Section 806-83 for the violation of a final order issued under Section 806-31 et *seq.* would have to be based on evidence obtained on the reinspection or at least at some time subsequent to the original inspection contemplated in Section 806-30. Whether a prosecution for failure to comply with such a final order would be valid if based on evidence obtained on a reinspection without a search warrant over the objection of the owner is not before us in this case. However, *State v. Lindway, supra,* appears to be dispositive of that question also.

This issue simply boils down to the question of whether the first inspection authorized under Section 806-30 constitutes unreasonable search and seizure. As to the "seizure" portion of the phrase, the question answers itself, since no seizure is contemplated. As to "search," if we are to follow the rule stated by Prettyman, J., in the *Little* case, the writer can conceive of no circumstances under which a reasonable search could be made, or, to state it another way, any search without a search warrant would be unreasonable. We are not ready to say that the framers of the Constitution used the word, "unreasonable," for no purpose whatsoever.

An examination of the pertinent statutes relating to search warrants, Sections 2933.21 to 2933.31, inclusive Revised Code, discloses that none of them are applicable to inspections such as provided for here, and they add no light to this problem except to show that, if entry were to be denied except upon production of a search warrant if demanded, further legislation would be necessary.

The right of a home owner to the inviolability of his "castle" should be subordinate to the general health and safety of the community wherein he lives. Certainly this ordinance does not contemplate the invasion of the privacy

of the home, and, as applied to the relator here, the record confirms the reasonableness of the Housing Inspector's actions.

We, therefore, conclude that an ordinance establishing minimum standards "governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation," and "governing the conditions and maintenance of dwellings," and containing a provision which authorizes a housing inspector to make inspections of "dwellings, dwelling units, rooming houses, rooming units and premises located within the city" and which also authorizes such inspector "upon showing appropriate identification * * * to enter, examine and survey at any reasonable hour all dwellings" and which requires that the "owner or occupant of every dwelling" shall give such inspector "free access to such dwelling * * * at any reasonable hour for the purpose of such inspection, examination and survey," with penalties of fine or imprisonment or both for violation of such provision, is not violative of Section 14 of Article I of the Ohio Constitution prohibiting unreasonable searches and seizures.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

WEYGANDT, C. J. ZIMMERMAN, STEWART, TAFT, MATTHIAS AND BELL, JJ., concur.

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No. [redacted]30

IN THE

Supreme Court of the United States

October Term, 1958

THE STATE, ex rel EATON, Appellant,

vs.

PRICE, CHIEF OF POLICE, Appellee.

MOTION AND SUPPORTING BRIEF

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IN THE

Supreme Court of the United States

October Term, 1958

No.....

THE STATE, ex rel EATON,

Appellant,

vs.

PRICE, CHIEF OF POLICE,

Appellee.

MOTION AND SUPPORTING BRIEF

The City of Dayton, Ohio, appellee, asks dismissal of this appeal, or the affirmance of the judgment of the Supreme Court of Ohio because:

(a) No substantial Federal question is here presented.

(b) The judgment of the Supreme Court of Ohio rests on an adequate non-Federal basis.

MEMORANDUM IN SUPPORT OF MOTION

I.

The Fourth Amendment to the Federal Constitution limits only Federal authority.

Feldman vs. U.S., 322 U.S. 487, 88 L. Ed. 1408.

State vs. Lindway, 131 O.S. 166, 2 N.E. (2d) 490.

Rights equally hallowed in the Anglo-Saxon view
justice are not exacted of the states by the Bill of Rig

Evidence obtained on search without warrant.
(Am. IV)

Wolf vs. Colorado, 338 U.S. 25, 48, 93 L. Ed. 17.

Immunity for self-incrimination. (Am. V)

Twining vs. N.J., 211 U.S. 77, 53 L. Ed. 97.

Adamson vs. Calif., 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A.L.R. 1223.

Requirement of indictment by grand jury. (Am.

Hurtado vs. Calif., 110 U.S. 516, 28 L. Ed. 232, 4 Ct. 111, 292.

Jury trial and other rights of accused. (Am. VI

Eilenbecker vs. District Court, 134 U.S. 31, 33 Ed. 801.

Fay vs. N.Y., 332 U.S. 261, 91 L. Ed. 2043. (Six and Seventh Amendments not picked up by due process clause of the Fourteenth.)

Gallegos vs. Neb., 342 U.S. 55, 96 L. Ed. 86.

Palko vs. Conn., 302 U.S. 319, 82 L. Ed. 288.

II.

There is no showing of the denial of a Federal ri
Article I, Section 14 of the Ohio Constitution forbids
reasonable searches and seizures in almost the exact
guage of the Fourth Amendment. Ohio's highest
has analyzed the challenged ordinance and has found
not to violate the Ohio Constitution. Impressive reas
has led significant minorities of this Court to conclude
the Bill of Rights is made applicable to the states by
force of the Fourteenth Amendment. But neither it
due process is a sword to cripple the police power of

states or their communities to foster the health and safety of their people.

Kovacs vs. Cooper, 93 L. Ed. 515-77, 336 U.S. 77.

Lochner vs. New York, 49 L. Ed. 937, 198 U.S. 45-76 (dissenting opinion of Mr. Justice Harlan, pp. 65-66).

Respectfully Submitted,

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SUPREME COURT OF THE UNITED STATES

OHIO EX REL. EATON *v.* PRICE, CHIEF OF POLICE.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 699. Decided June 8, 1959.

30 O.T. 1959

PER CURIAM.

Probable jurisdiction is noted.

MR. JUSTICE BRENNAN who voted to note probable jurisdiction filed a separate memorandum.

MR. JUSTICE FRANKFURTER, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER, who voted against noting probable jurisdiction filed a separate memorandum.

MR. JUSTICE CLARK who voted against noting probable jurisdiction filed a separate memorandum.

MR. JUSTICE STEWART took no part in the consideration or decision of this application.

SUPREME COURT OF THE UNITED STATES

No. 699.—October Term, 1958.

Ohio ex rel. Eaton, Appellant, v. Price, Chief of Police.	On Appeal From the Supreme Court of Ohio.

[June 8, 1959.]

Mr. Justice Brennan.

The Court's practice, when considering a jurisdictional statement whereby a litigant attempts to invoke the Court's jurisdiction on appeal, is quite similar to its well-known one on applications for writs of certiorari. That is, if four Justices or more are of opinion that the questions presented by the appeal should be fully briefed and argued orally, an order noting probable jurisdiction or postponing further consideration of the jurisdictional questions to a hearing on the merits is entered. Even though this action is taken on the votes of only a minority of four of the Justices, the Court then approaches plenary consideration of the case anew as a Court; votes previously cast in Conference that the judgment of the Court appealed from be summarily affirmed, or that the appeal be dismissed for want of a substantial federal question, do not conclude the Justices casting them, and every member of the Court brings to the ultimate disposition of the case his judgment based on the full briefs and the oral arguments. Because of this, disagreeing Justices do not ordinarily make a public notation, when an order setting an appeal for argument is entered, that they would have summarily affirmed the judgment below, or have dismissed the appeal from it for want of a substantial federal question. Research has not disclosed any instance of such notations until today.[1]

[1] Likewise, dissents from orders granting certiorari are ordinarily not publicly noted, even though the grant or denial of certiorari, as we have often said, expresses no intimation as to the merits of a

The reasons for such forebearance are obvious. Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case, and public expression of views on the merits of a case by a Justice before argument and decision may well be misunderstood; the usual practice in judicial adjudication in this country, where hearings are held, is that judgment follow, and not precede them. Public respect for the judiciary might well suffer if any basis were given for an assumption, however wrong in fact, that this were not so. Thus, the practice of not noting dissents from such orders has been followed regardless of how strongly Justices may have felt as to the merits of a case or how clearly they have thought decision in it controlled by past precedent.[2] A precedent which appears to some Justices, upon the preliminary consideration given a jurisdictional statement, to be completely controlling may not appear to be so to other Justices. Plenary consideration can change views strongly held, and on close, reflective analysis precedents may appear inapplicable to varying fact situations. I believe that this approach will obtain in this case despite the unusual notation made today by four of my colleagues.

---

case. The sole exception found appears to be *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 937, where the extraordinary power to grant certiorari before judgment in the Court of Appeals was exercised, and two Justices expressed their view that judgment in that court should have been obtained before this Court reviewed the case. Of course, in these circumstances, the notation could not possibly have implied or have been taken to imply any view of the case on the merits.

[2] Notation of dissent from a denial of certiorari, or from a summary disposition of an appeal, is a completely different matter. Such notations occur with some frequency and I have made them myself. They are expressions of a Justice's view that a case should be heard when the Court decides not to have a hearing. Obviously such notations do not tend to foreclose or embarrass consideration of the case when it is later heard, since by definition it is not to be heard.

SUPREME COURT OF THE UNITED STATES

No. 699.—October Term, 1958.

Ohio ex rel. Eaton, Appellant, v. Price, Chief of Police.	On Appeal From the Supreme Court of Ohio.

[June 8, 1959.]

Mr. Justice Frankfurter, Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker are of the view that this case is controlled by, and should be affirmed on the authority of, *Frank* v. *Maryland*, — U. S. —, decided on May 4, 1959.

The *Frank* case was decided on May 4. Application to review this case came before us within two weeks of the *Frank* decision. Since we deem the decision in the Maryland case to be completely controlling upon the Ohio decision, we are of the opinion that it would manifest disrespect by the Court for its own process to indicate its willingness to create an opportunity to overrule a case decided only a fortnight ago after thorough discussion at the bar and in the briefs and after the weightiest deliberation within the Court.

SUPREME COURT OF THE UNITED STATES

No. 699.—October Term, 1958.

Ohio ex rel. Eaton, Appellant, v. Price, Chief of Police.	On Appeal From the Supreme Court of Ohio.

[June 8, 1959.]

Mr. Justice Clark.

This case cannot be considered in isolation. In his jurisdictional statement filed February 12, 1959, appellant stated that No. 278, *Frank* v. *Maryland*, "is similar to the facts in this case at bar and involves the same constitutional questions," thus raising "substantially the same problems presented by this appeal." We, therefore, held this case awaiting the decision in No. 278, *Frank* v. *Maryland*. It was decided May 4, 1959, by a 5–4 vote. Thereafter this case was again considered and Brother Stewart, who was with the majority in *Frank*, recused himself because the case came from Ohio's Supreme Court, where his father then served. After a study of the two cases I agreed with appellant that this case "similar to the facts," involved the same constitutional questions and raised "substantially the same problems" as the *Frank* case. In fact, as presented here, the cases appeared to be on all fours, except that the penalty provision in Maryland's Act is $20, while that of Ohio's law is a maximum of $200, or a jail sentence not exceeding 30 days. I therefore voted to affirm. My brothers in the majority in *Frank* voted likewise. However, the four dissenters in *Frank* voted to note probable jurisdiction and bring the case on for argument. The result, for all practical purposes, is a reconsideration of the constitutional question decided in *Frank* by a full Court. This flies in the face of the real purpose, as well as the intended effect, of our Rule 58

which permits rehearings only "at the instance of a justice who concurred in the judgment or decision . . . ." It likewise is, in my view, very poor judicial administration, especially since *Frank* was decided less than four weeks ago and only an eight-man Court can sit to review the question decided there.

Believing that the Bar will be confused by this action today, which beyond doubt will be characterized as a reconsideration of the *Frank* holding, I have noted my adherence to *Frank*. Otherwise my silence would be construed as acquiescence in a reconsideration of that case. While I have followed a policy of not noting my vote in Conference, except on the merits, our reports are full of such notations.

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

Case No. 30.

THE STATE, *ex rel.* EATON,
Appellant,
vs.
PRICE, CHIEF OF POLICE,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF ON MERITS.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

Case No. 30.

THE STATE, *ex rel.* EATON,

Appellant,

vs.

PRICE, CHIEF OF POLICE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF ON MERITS.

OPINIONS BELOW.

The opinion of the Trial Court for a Writ of Habeas Corpus which involves the same question presented here is not officially reported but is set forth in R., p. 4.

The Court of Appeals reversed the Trial Court and held that the ordinance in question is not unconstitutional by a two to one decision. A dissenting opinion was written. The opinion of the court is officially reported in 105 Ohio App., 376. This opinion is set forth in R., p. 47. The Supreme Court of Ohio affirmed the Court of Appeals of the 2nd District of Ohio and reversed the Trial Court holding that the ordinance was not in violation of the Constitution of Ohio nor the Constitution of the United States or any of its amendments thereto. Said opinion is officially reported in 168 O. S. page 123. Said opinion is found in R., p. 73.

Application for rehearing was denied without opini
by order unofficially reported in 31 Ohio Bar (Oct.
1958) 895.

Probable jurisdiction is noted by the Supreme Cou
of the United States on June 8, 1959, in Case No. 6
October Term. (R. pp. 98, 99.)

Three separate memorandums were written by t
Honorable Judges, Mr. Justice Brennan, Mr. Justi
Frankfurter, Mr. Justice Clark, Mr. Justice Harlan, a
Mr. Justice Whittaker.

JURISDICTION INVOKED.

The Appellant appeals from the final judgment of th
Supreme Court of Ohio remanding him to the custody
the Chief of Police for the Crime of violating one of th
Housing and Health Ordinances of the City of Dayto
Ohio, after he had been released on a Writ of Habea
Corpus by a Court of General Jurisdiction, said Cou
holding that the ordinance was unconstitutional, in viola
tion of the Ohio and United States Constitutions.

He submits this statement to show that the Suprem
Court of the United States has jurisdiction of the appea
and that substantial questions are presented.

JURISDICTION.

Prosecution was brought by the City of Dayton fo
violation by Appellant of the provisions of Dayton City
Ordinance 18099, Section 806.30 in that he refused entry
of his private home to a housing inspector, which under
said ordinance gave such inspector the right of entry with-
out permission, without even suspecting that a nuisance
existed. A Housing Inspector sought to inspect the in-

terior of the appellant's home without a search warrant and over the objection of the appellant.

When the Appellant, Earl Taylor, was placed under One Thousand Dollar ($1,000.00) Bond, he was remanded to jail upon his failure to give bond a Writ of Habeas Corpus was filed in the Court of Common Pleas, at which time the appellant contended the Ordinance 18099, Section 806.30 was in violation of his constitutional rights as provided in Ohio Constitution Article I, Section 14, and United States Constitution and its amendments thereto—Amendments Four and Fourteen.

Judgment of Trial Court in the Writ of Habeas Corpus proceedings was in favor of the appellant, said Court holding said ordinance 18099, Section 806.30 was a violation of the appellant's constitutional right when he chose to defy the housing inspector's permission to inspect his private home without a search warrant. The Court held that the ordinance was not in itself unconstitutional but the appellant, Earl Taylor, had the right to waive or exercise his constitutional right. When he chose to exercise his constitutional right, then such ordinance is unenforceable as to him, and repugnant to the Constitution of Ohio and Constitution of the United States and its Amendments thereto.

Notice of Appeal was filed January 5, 1959, with the Clerk of the Supreme Court of Ohio, and in the Court of Common Pleas of Montgomery County, Ohio within 90 days from overruling the application for rehearing October 8, 1958, as provided by Rule 11, Section 1 of the Supreme Court of the United States and as required by U. S. C. Title 28, Section 2101.

On June 8, 1959 this Honorable Court noted probable jurisdiction.

STATUTES INVOLVED.

Dayton City Ordinances, Ordinance Number 18099, Section 806.30 and Section 806.83 are set forth in the Record at pp. 44 and 45.

Amendments to the Constitution of the United States, Article IV, provides (1 United States Code, 1952 Edition, XLIV):

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendments to the Constitution of the United States, Article XIV, provides, in part (1 United States Code, 1952 Edition, XLV):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 14 of the Ohio Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

QUESTIONS PRESENTED.

No. 1. Can a housing inspector of the City of Dayton, Ohio, inspect a private home under an ordinance establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make a dwelling safe, sanitary and fit for human habitation without a search warrant if the owner or occupant objects to said inspection?

No. 2. Did the Supreme Court of Ohio err in sustaining the Court of Appeals for the 2nd District of Ohio, overruling the Trial Judge in this case by sustaining the validity of an ordinance of the City of Dayton, Ohio, to-wit: 18099, Section 806.30 and Section 806.83 and of the proposed inspection of Appellant's private home under said ordinance sought to be made thereunder in the daytime without a search warrant, against the Appellant, Earl Taylor's objection; Appellant claiming that said section of the ordinance was repugnant to the fourth and fourteenth amendments of the Constitution of the United States?

The Appellant, by said judgment, was remanded into the custody of the Chief of Police of the City of Dayton. The final judgment reversed the trial court after said trial court held said ordinance invalid and unconstitutional as it applies to private homes when the owner or occupant does not waive his constitutional right to a search.

No. 3. Did the proposed inspection constitute an unreasonable and illegal search of the Appellant's, Earl Taylor's home, a wrongful trespass upon his property and in violation of his constitutional rights under the fourth and fourteenth amendments of the Constitution of the United States?

STATEMENT OF FACTS.

The appellant Earl Taylor has lived in Dayton for over sixty-three (63) years and resided with his wife in their home at 130 Henry Street for more than eleven years.

He has resided in a private home, consisting of two bedrooms, bath, living room, dining room, sun porch and kitchen with attached garage.

It is admitted there were no rented rooms, no boarders, nor any tenants in the house.

The Mayor and the City Commission of Dayton, Ohio, exercising within the limits of that city all of the police power of the State of Ohio enacted Ordinance No. 18099.

The plight of the petitioner and appellant grows out of an ordinance of the City of Dayton, Ohio. Said ordinance is designated "An Ordinance establishing minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation."

The ordinance provides, among other things, that the owner or occupant of every dwelling, dwelling unit, rooming house and rooming unit shall give the housing inspector free access to such dwelling, dwelling unit, rooming house or its premises, at any reasonable hour for the purposes of inspection, examination and survey.

The ordinance provides, that any person who shall violate any provision of this ordinance, upon conviction, shall be punished by a fine of not less than $20.00 nor more than $200.00, or by imprisonment of not less than two days nor more than thirty days or both.

When the inspectors appeared at the appellant's home, he inquired of them what they wanted to inspect and they said, "According to this ordinance, we got a right to go through your house and inspect your house."

The appellant replied, "I don't think you have, unless you got a search warrant."

The appellant inquired of the housing inspector employee what he was looking for, but said employee could not tell him, and just said, "I want to inspect the whole inside of your house."

The inspectors came three or four times and requested permission before the affidavit was filed. Said inspectors had been making a door to door check of the various premises in the vicinity of the appellant's home.

The petitioner refused to permit the housing inspectors to enter his home on several occasions without a search warrant, and pursuant to the penalty provision of the ordinance he was arrested by the Police Department of the City of Dayton, Ohio, for the violation of said ordinance, namely, refusing to allow a housing inspector to enter his private dwelling for the purpose of making an inspection of his premises.

Said case appears on the docket in the Municipal Court, Dayton, Ohio, in case number 163162 entitled City of Dayton vs. Earl Taylor.

The record discloses on March 20, 1957, one Earl Taylor was served by a police officer with an instrument, captioned "Affidavit and Warrant," issued out of the Dayton Municipal Court. The affidavit, sworn to and signed by one George Cooper on March 19, states that "on or about the 12th day of March, A. D., 1957 * * * Earl Taylor, being the owner of premises located at 130 Henry Street, did unlawfully refuse to permit a duly autl rized agent of the Division of Housing Inspection of the City of Dayton, to enter and survey the said premises for the purposes of repairs or alteration as are necessary to comply with the provisions of minimum housing standards contrary to the form of the ordinances to-wit: Section 806.30 of Dayton, Ohio * * *."

When served with the affidavit and warrant, he was not physically placed under arrest, but was ordered to appear in Municipal Court on March 26. On that day, he appeared in Court, entered a plea of not guilty, and, bond was fixed in the sum of one thousand ($1,000.00) dollars. Upon failure to provide bond, he was placed in jail. Late in the afternoon of the same day, a Writ of Habeas Corpus was sought in the Common Pleas Court of Montgomery County against the Chief of Police of Dayton on the application of Arthur T. Eaton to produce the body of Taylor, at which time he was released on his own recognizance by order of court, and the matter was set for hearing on April 8.

The appellant contended that the ordinance was repugnant to the Constitution of the United States and in violation of the Fourth and Fourteenth Amendments.

The appellant contended in the state courts that his incarceration in the City Jail was the result of his rightful refusal to submit to an unreasonable and illegal search of his home sought to be made under the ordinance in violation of the Fourth Amendment and without due process of law assured him by the Fourteenth Amendment of the Constitution of the United States.

Following the hearing, the Writ was allowed on May 26, 1956, and Taylor was discharged from custody, the court finding in its entry that "Section 806.30, of the Code of General Ordinances of the City of Dayton, Ohio, being ordinance No. 18099 * * * is unconstitutional as it applies to the facts in this case as violative of the Fourth Amendment to the Constitution of the United States and Article I, Section 14 of the Constitution of the State of Ohio."

ARGUMENT.

It is imperative that the basic fundamental differences between the Taylor case and the *Frank* case be set forth at the very outset of this brief.

If the facts in these two cases were identical there would be no justification for this Court to consider the Taylor case at this time.

The following are points of similarity between the Taylor case and the *Frank* case.

1. Mr. Taylor and Mr. Frank both refused inspectors admittance to their homes, one a housing inspector and the other a health inspector.

2. Mr. Taylor and Mr. Frank refused admittance of these inspectors without a search warrant. Both agreed to permit entry if a search warrant could be obtained.

3. Mr. Taylor and Mr. Frank maintained that any ordinance which provided for entry into their homes without their consent and without a search warrant was unconstitutional and in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

The above points of similarity between the two cases prompted the following to be said in the jurisdictional statement which was as follows:

"Aaron D. Frank, Appellant vs. State of Maryland, Appellee, Case No. 278, is similar to the facts in this case at bar and involves the same constitutional questions as to whether a city ordinance is repugnant to the United States Constitution when a home owner refuses permission to inspect his home without a search warrant, has recently been admitted by this Court for review."

There are certain fundamental differences of facts in the Taylor case and the *Frank* case.

When this Court considers these vital fundamental differences of fact between the Taylor case and the *Frank* case together with the difference in the Baltimore ordinance and the Dayton ordinance, we believe this entire Court will adhere to the unconstitutionality of the Dayton ordinance.

The following differences should cause this Court to declare the Dayton ordinance as applied to the facts in the Taylor case, unconstitutional.

1. The Taylors own their home, which is a neat, clean, attractive five (5) room one story house. (R. pp. 27-28.)

Here we have a considerable difference as the Frank house was in an "extreme state of decay" and in rear of the house there was a pile later identified as "rodent feces mixed with straw and trash and debris to approximately half a ton."

2. When the Dayton housing inspectors appeared at Mr. Taylor's home to inspect this house, Mr. Taylor asked the inspectors, what they desired to inspect. The inspectors could not or at least refused to inform Mr. Taylor as to any specific item they wanted to inspect. The housing inspectors insisted that the ordinance gave them the right to inspect the whole inside of the house. (R. p. 22.)

In the *Frank* case the inspector informed Mr Frank, the owner, he had evidence of rodent infestation and requested of Frank to inspect the basement area of his home which he refused.

The health inspector definitely told Mr. Frank what they were looking for, where they wanted to inspect and why.

The housing inspector never made any such specific requests of Mr. Taylor.

3. In the Taylor case there were no complaints from the neighbors or by anyone to the housing inspector or any city officials. (R. p. 27.)

In the *Frank* case the health inspector of Baltimore acted on a complaint from the 4300 block of Reistertown Road that there were rats in the complainant's basement. Mr. Frank lived at 4335 Reistertown Road. The inspector could see "rat feces and debris" on Mr. Frank's premises.

4. In the Taylor case, the Dayton ordinance 18099, Section 806.30 does not make it necessary to have reasonable grounds to believe that a nuisance exists or that there is a reason to believe the house is sub-standard and that it does not comply with the minimum standards set up for single dwelling homes. R., pp. 44-45.

Since it is not necessary to have a reason to enter any home, under said ordinance the housing inspector can demand admittance to any single dwelling house on any day and look inside whenever he might desire. He can demand to inspect any home, anywhere in the city of Dayton well knowing the same is not sub-standard and without any excuse or cause whatsoever.

In the *Frank* case, the Baltimore ordinance gave the health commissioner the right of entry only after he had cause to suspect that a nuisance exists in said house, cellar or enclosure.

5. Unlike the Baltimore ordinance in the *Frank* case, the Dayton ordinance in the Taylor case was brand new having been adopted by the City of Dayton

for the first time in 1954. (R. p. 46.) This ordinance was challenged for the first time as it applied to right of entry into a private home in this case. To our knowledge this was the first time the housing inspectors arrested a home owner for refusal to throw open his home for their inspection.

The Baltimore ordinance in the *Frank* case had its beginning in Maryland's Colonial History and had been an integral part of enforcement of Baltimore's health laws for more than a century and a half. This Court held that fact was a factor to be considered in determining whether conviction under Baltimore code for resisting an inspection of a house without search warrant was obtained in violation of the Fourteenth Amendment.

Now let's examine certain constitutional fundamental rights in relation to the facts as they exist in the case at bar.

We have approximately 172 million people in the United States. We have approximately 50 million homes in the United States.

If Mr. Taylor must allow an inspection of his home then every individual in this United States of America must submit to an inspection of his home or premises.

The case of the Fourth Amendment prohibiting unreasonable searches applies to the states through the due process clause of the Fourteenth Amendment. *Wolf vs. Colorado*, 338 U. S. 25, 69 S. Ct., 1359; *Frank vs. State of Maryland*, 79 S. Ct., 804.

Judge Whitaker in his concurring opinion in the *Frank* case said the Court was adhering to that principle.

The concern for individual rights were the historic impulse that created the Fourth Amendment. The appli-

cation of the Fourth Amendment and the extent to which the essential right of privacy is protected by the due process clause of the Fourteenth Amendment is now under consideration.

The housing inspectors in this case said they wanted to make an inspection. It actually would amount to a search of the house.

The question in this case is whether a search warrant is needed to enter a citizen's home to inspect his premises.

Mr. Taylor's home is strictly a private residence, which at the time in question was in a good, clean, safe and sanitary condition. No complaint had been filed with respect to the condition of premises. There was nothing visible from the outside to cause anyone to suspect there was anything wrong with the premises.

This Court has said many times that a search without a warrant can be made only in exceptional circumstances.

If a house is on fire or if the police see a fugitive enter a building, entry without a search warrant can of course be made. Yet absent such extraordinary situations, the right of privacy must yield only when a judicial officer issues a warrant for a search on a showing of probable cause. *Johnson v. United States,* 333 U. S., 10, 14, 68 S. Ct., 367, 369, 92 L. Ed. 436; *Trupiano v. United States,* 334 U. S. 699, 705, 68 S. Ct., 1229, 1232, 92 L. Ed., 1663; *McDonald v. United States,* 335 U. S. 451, 454-455, 69 S. Ct., 191, 192-193, 92 L. Ed. 153.

The Court said in *McDonald v. United States, supra,* 335 U. S., 455-456, 69 S. Ct., at page 193:

> "The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the

citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police action on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

This Dayton ordinance attempts to give these housing inspectors more power, more authority than the constitution and the right to enter as their fancy desires.

It is true that present-day living conditions have brought about many problems which require the relinquishment of certain of our rights for the benefit of the greater number of our people, but just how far we are to go in this respect is a matter of great concern.

The taking away of any of our fundamental rights should be approached with caution and carefully. We should beware of taking away, because once lost they are hard to be regained.

The history of the constitutional protection, against official invasion of any citizen's home makes explicit the human concerns which it was meant to respect.

The philosophy of the Fourth Amendment was well expressed by Mr. Justice Butler speaking for the Court in *Agnello v. United States*, 269 U. S. 20, 32, 46 S. Ct. 4

6, 70 L. Ed. 145. "The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our law." This court has emphasized over and again that a search without a warrant can be made only in exceptional circumstances.

Under the Dayton ordinance they do not need to have any reason to look inside the private home except a desire to inspect or search it.

In the case of *District of Columbia v. Little*, 178 Federal, 2d, 13, United States Court of Appeals, District of Columbia Circuit, decided August 1, 1949, the Court held,

> "That no difference between the words 'inspect' and 'search' exists in regard to the provision of Fourth Amendment prohibiting unreasonable 'searches' of homes. Inspector of Health Department was required under the amendment to obtain a warrant to 'inspect' defendant's home over defendant's protests.
>
> 'Inspection' of a home by a health inspector is a 'search' thereof within the meaning of the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches." *District of Columbia v. Little, supra.*

The Due Process Clause of the Fourteenth Amendment enjoins upon the States the guarantee of privacy embodied in the Fourth Amendment (*Wolf v. Colorado*, 338 U. S. 25, 69 S. Ct. 1359) whatever may be the means established under the Fourth Amendment to enforce that guarantee.

Under the Baltimore ordinance in the *Frank* case the majority of this Court laid great emphasis on the fact that "Valid grounds for suspicion of existence of a nuisance must exist."

In the *Frank* case the entire court, and we are sure the public, would condemn the unsanitary conditions as existed on those premises.

Here we have a neat, clean and attractive home, well preserved and well kept.

There is not any reason to believe a nuisance exists. There is no reason to believe the house to be sub-standard.

In the Dayton Ordinance no valid grounds for suspicion of the existence of a nuisance need exist.

The fact is no nuisance did exist. (R. pp. 27-28.)

A nuisance may be defined as such unreasonable, unwarrantable or unlawful use by a person of his own property or his improper, indecent or unlawful conduct which operates as an obstruction or injury to the right of another or to the public and which produces such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.

Jezowski v. City of Reno, 286 P. 2nd, 257-261.

To constitute a nuisance it is sufficient if it produces that which is offensive to the senses and renders the enjoyment of life and property uncomfortable.

Miller vs. Coleman, 97 S. E. 2nd, 313-317.

Since no nuisance existed, and the home was neat and tidy under what theory could this Dayton ordinance be constitutional if the owner must permit his home to be inspected (*searched*)?

The Court said in *Wolf v. Colorado, supra*, 338 U. S. at page 27, 69 S. Ct. at page 1361, that "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."

Why would there ever be any reason to get a search warrant by an official, whether he be health inspector or city police, county sheriff, etc.

The housing inspectors could always get in your home, and if not admitted the owner or occupant could be jailed.

The right of privacy is so dear to the American people, especially of Texas that after the *Frank* decision the legislature passed a law prohibiting entry into a private home except by search warrant.[1]

The right provided in the Fourth and Fourteenth Amendment of the United States Constitution is the guarantee against invasion of the home by officers without a warrant. No officer of government is authorized to penalize the citizen because he invokes his constitutional protection.

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[1] The following act was signed by the Governor of Texas July 30, 1959 and filed July 31, 1959 and is now in effect.

H. B. 58.

AN ACT

making it unlawful for any person to inspect private residences without permission from lawful adult occupant or authority from a magistrate or court; providing evidence obtained in violation shall be inadmissible in criminal proceedings; providing a penalty for violation and for turning over evidence obtained in violation to certain bodies; repealing all laws in conflict; providing a severability clause; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. No officer, agent or representative of the State of Texas or any instrumentality or political subdivision thereof, or any other person, may enter a private residence for purpose of making a health inspection at any time without first receiving permission from a lawful adult occupant of such residence or being authorized to inspect that particular residence for a specific public health purpose by a magistrate or by order of a court of competent jurisdiction upon a showing of a probable violation of the State Health Code or a law or ordinance pertaining to health of a political subdivision. Any evidence obtained in violation of the provisions of this Section shall be inadmissible as evidence in any criminal case prosecuted by the State of Texas or a political subdivision thereof.

Sec. 2. Any person violating the provisions of Section 1 of this Act shall be punished by confinement in the State penitentiary for a period not to exceed two (2) years or by a fine not to exceed One Thousand Dollars ($1,000) or by both such fine and imprisonment.

Entry without warrant would deprive the owner of his right of privacy.

> "The power of the inspector to examine private homes for possible violations which may result in imposition of criminal penalties has raised the question whether he may demand entry without presentation of a court order. Although some codes require the inspector to obtain a court order if he is denied access (footnote—see e.g. Denver, Colorado Housing Code Ordinance No. 27, Section 8—1944), many codes apparently require occupants to admit inspectors without a warrant. However, in District of Columbia v. Little (178 F. (2d), 13 (D. C. Cir. 1949)), affirmed on other grounds, 339 U. S., 1 (1950), the Fourth Amendment was held to require that an inspector procure a warrant when refused entry, and this result, although making occasional inconveniences for inspecting teams, seems justifiable, since the protection of community health would not seem to necessitate a greater infringement of individual privacy than does protection against crime." 69 *Harvard Law Review* (1956), at page 1125.

The fallacy in maintaining that the Fourth Amendment was designed to protect criminals was emphasized by Judge Prettyman in *District of Columbia v. Little*, 85 U. S. App., D. C. 242, 178 F. 2d, 13, 16-17, 13 A. L. R. 2d 954, affirmed on other grounds, 339 U. S. 1, 70 S. Ct., 468, 94 L. Ed., 599:

> "The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon

contributions to human progress. It was not related to crime or suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. So much is clear from any examination of history, whether slight or exhaustive. The argument made to us has not the slightest basis in history. It has no greater justification in reason. To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.

Judge Prettyman added that the Fourth Amendment applied alike to health inspectors as well as police officers —indeed to every and any official of government seeking admission to any home in the country:

"We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite." Id., 178 F. 2d, at 17. And see *Ill. L. Rev.* 845.

The constitutional provision is against unreasonable search and seizures, and no warrant to issue except upon probable cause.

The judgment in the *Little* case was affirmed by the Supreme Court of the United States in 339 U. S. 1, 94 L. Ed., 599, 70 S. Ct., 468. However, the Supreme Court avoided passing on the constitutional question, said in its opinion:

"The officer had no search warrant. While he was standing outside the door, respondent returned. She protested the right of the inspector to enter her private home, claiming that his entry would violate her constitutional rights. She neither used nor threatened force of any kind. In view of these facts found by the courts below, the question boils down to whether respondent's mere refusal to unlock the door accompanied by remonstrances on substantial constitutional grounds was the kind of interference prohibited by the regulation. We hold that it was not."

This Honorable Court went on to say in the above case:

"Had the respondent not objected to the officer's entry of her house without a search warrant, she might thereby have waived her constitutional objections. The right of privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than respondent did here. The judgment of the Court of Appeals affirming the Municipal Court of Appeals judgment setting aside the conviction is affirmed."

Under the facts in this case no magistrate would have issued a search warrant. The housing inspectors had not given such information as would justify a search warrant being issued.

What justification can there be of entering a private home without one, when the facts disclose that no search warrant would be issued by a magistrate?

Under the Fourth Amendment inspectors of Health Department without a search warrant could not invade a private home to see that it was clean and wholesome, or to search for garbage upon a complaint that garbage was accumulated in hallways, or to see whether occupants had

failed to avail themselves of toilet facilities therein. *District of Columbia v. Little*, 178 Fed. 2d, 13.

A housing inspector stands in no better position.

The first clause in the Fourth Amendment creates nothing new. It preserves an existing fundamental right. The second clause limits and circumscribes the one recognized exception to that right. The privilege claimed by the City of Dayton would destroy the right and nullify the first clause.

The Fourth Amendment provides the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection is self-protection.

If such a law as the Dayton Ordinance can be enforced, it would afford multiple opportunities for illegal and immoral trespass upon the occupant of the home. When these inspections would be usually made the husband is at work and the housewife alone. If a warrant is necessary for admittance then all parties would have notice, when such inspector would be present.

Let's assume that these same housing inspectors had appeared at a Dayton home recently built costing $100,000.00. If they are correct, that the ordinance gives them the authority to enter without a reason or excuse, they could enter this newly constructed home as well as Taylor's home.

In this $100,000.00 home the inspectors could roam about at their pleasure and convenience. The owner would have no privacy; he must admit them. What justification would the Dayton magistrate have in issuing a search warrant to inspect the new home? We cannot conceive of any justification.

If there is no justification for issuing a search warrant, then under what theory would these inspectors have a right to enter the $100,000.00 home or Taylor's home?

In the *Frank* case it was said,

> "this is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crimes. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.
>
> The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought. This is not to sanction synthetic search warrants but to recognize that the showing of probable cause in a health case may have quite different requirements than the one required in graver situations. It can hardly be denied, unless history is ignored, that the policeman's or the inspector's knock on the door is one of these 'official acts and proceedings' which Boyd v. United States, supra, 116 U. S. 624, 6 S. Ct. 529, brought squarely within the Fourth Amendment."

What is said about a health inspector is applicable to a housing inspector.

It is complained that the requirement of a search warrant would be inconvenient and impractical for the purpose of housing inspection. The Constitution has often been found inconvenient. But if a search warrant is the only constitutional method provided whereby the city of Dayton might pursue its purpose, it must either procure one upon demand or forego the "inspection." Mr. Taylor was therefore, entirely within his rights to refuse admittance to anyone without a search warrant.

We must distinguish between a public building and Mr. Taylor's private home. The law that applies to a business that needs a license, whether it be hotels or rooming houses, apartment houses, is different than the law that applies to a private home where it would be impossible to compel one living in a private home to obtain such a license to live there.

The case of *Hubbell v. Higgins*, 148 Iowa, p. 36:

> "The legislature in the exercise of its police power may provide for the inspection of hotels in the interest of public safety and health, and this right of inspection is a mere incident of such power, an exercise of which violates no constitutional guarantee against the right of entry upon private property and search without due process of law."

Under the present provisions of this Dayton ordinance the home owner or occupant must act at his peril. Either he must keep the doors of his dwelling open during all hours that the inspector thinks are reasonable or he must risk fine and imprisonment if his own judgment of the matter is in error.

Measures enacted under the police power must still be reasonable, not only in their substantive provisions, but also in the means provided for their administration and enforcement. 10 *Ohio Jurisprudence* (2d), 454, 455, Constitutional Law, Sections 367, 377.

The Supreme Court of Ohio referred to the case of *Givner v. State* in its opinion.

In *Givner v. State*, 210 Md. 484, 124 A. (2d) 764, the Court of Appeals of Maryland, in a decision rendered in July 1956, held that municipal ordinances, authorizing health, fire and building inspectors to enter upon premises during daylight hours for the purpose of inspecting such premises to determine compliance with code provisions

and fixing a penalty as to the owner or occupier of premises who refused to allow such inspections, were not unreasonable or unconstitutional as an authorization of an illegal search of the premises.

Factually, the *Givner* case differs greatly from the *Little* case and the Taylor case at bar. The *Givner* case arose out of an attempted inspection of an apartment building, while the *Little* case and the Taylor case arose out of attempted inspections of private residences.

As was said by the Court in the *Frank* case:

> "The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government."

We agree. We also realize this following statement by the Court is pertinent.

> "The growth of cities, the crowding of populations, the increased awareness of the responsibility of the state for the living conditions of its citizens, all have combined to create problems of the enforcement of minimum standards of far greater magnitude than the writers of these ancient inspection laws ever dreamed."

The law can know no distinction between citizens because of superior cultivation of one over the other.

We cannot conceive that every person in the United States must admit a housing inspector upon his knock of the door.

Surely a housing inspector must have some reasonable ground to believe that the house might breed and spread disease, its condition create a slum area, or it was of substandard type and in a substandard condition.

In the case at bar we have a neat, clean, well preserved home, one which there were no complaints, and actually was in excellent shape and condition both inside and outside.

Any inspector could see this well preserved home, neatly kept, that no nuisance existed on the outside. Surely that was some indication of the conditions on the inside. The house was neat and clean, modern on the inside. (R. p. 28.)

In such a place we do not have a break down of the fiber of people. This is not the absence of the barest essentials of civilized living.

This is a respectable person living in the City of Dayton, that enjoyed a comfortable home and all the necessities of life and some luxuries.

The Dayton Ordinance interfered with his right of privacy; a knock on his door took him to jail and required him to give $1,000.00 bond to be released.

This independence and freedom that Taylor has enjoyed all these years under the Constitution was taken away from him by this Dayton City Ordinance.

We believe that such an ordinance that puts no restriction of any kind whatsoever against entry into a private home is unconstitutional.

Surely a City ordinance cannot confer right to an officer, police or any other person called inspector that the Constitution of the United States denies to him.

Mr. Taylor was within his legal and lawful right when he denied admittance of the Dayton City Inspectors.

For the various reasons set forth in this brief, this Court should declare this ordinance unenforceable and in violation of the Constitutional guarantees of the Fourth and Fourteenth Amendments thereto.

As we said in the beginning of our brief, the facts in this case and the *Frank* case are so different in so many respects that to reverse the decision by the Supreme Court of Ohio and affirm the trial court would in no way interfere with the *Frank* decision rendered by this Honorable Court.

Respectfully submitted,

STANLEY DENLINGER,

Counsel for Earl Taylor.

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JAMES R. BROWNING, Cl

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 30

OHIO EX REL. EATON,

Appellant,

v.

PRICE, CHIEF OF POLICE,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 30

OHIO EX REL. EATON,

Appellant,

v.

PRICE, CHIEF OF POLICE,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE APPELLEE

Opinions Below

The opinions delivered in the courts below are as follows:

1. The Common Pleas Court of Montgomery County, Ohio, held the housing inspection ordinance of Dayton violative of the fourth amendment to the Constitution of the United States and article I, section 14 of the Constitution of Ohio. Its opinion is not officially reported, but appears in the record (R. 4).

2. The Court of Appeals of Montgomery County, Ohio, reversed the judgment of the trial court, holding the housing inspection ordinance not violative of the fourth amendment to the Constitution of the United States nor of article I, section 14 of the Constitution of Ohio. Its opinion is

officially reported at 105 Ohio App. 376, 152 N.E.2d 776 (1957), and also appears in the record (R. 47).

3. The Supreme Court of Ohio affirmed the judgment of the Court of Appeals, holding the housing inspection ordinance not violative of the fourth amendment to the Constitution of the United States nor of article I, section 14 of the Constitution of Ohio. Its opinion is officially reported at 168 Ohio St. 123, 151 N.E.2d 523 (1958), and also appears in the record (R. 73).

Jurisdiction

The jurisdiction of this Court is governed by 28 U.S.C. § 1257(2) (1952). Under that statute, there is no jurisdiction of this appeal because the validity of the Dayton housing inspection ordinance under the due process of law clause of the fourteenth amendment to the Constitution of the United States was not drawn in question in the state courts.

Constitutional Provision and Ordinance Involved

The only constitutional provision involved in this appeal is the fourth amendment to the Constitution of the United States, which is set out verbatim on page 4 of Appellant's Brief.

The ordinance involved in this appeal is DAYTON, OHIO, HOUSING ORDINANCE §§ 806.30, 806.83 (1955), the pertinent text of which is set forth in the Appendix to this Brief, pp. 26-28, and also in the record (R. 44-46).

Questions Presented

The following jurisdictional questions are presented by this appeal:

1. Whether the validity of the Dayton housing inspection ordinance under the fourteenth amendment to the Consti-

tution of the United States was properly raised in the Ohio state courts, so as to confer upon this Court jurisdiction to decide an appeal under that amendment.

2. Whether the contention that the fourth amendment to the Constitution of the United States is applicable to the Dayton housing inspection ordinance is of sufficient substantiality to warrant consideration by this Court.

In the event that it should be decided, against the contention of Appellee, that the Court has jurisdiction of this appeal, then the following question on the merits is presented:

3. Whether the section of the Dayton housing ordinance authorizing the Housing Inspector, upon showing identification, to enter dwelling units at reasonable hours to detect conditions existing in violation of that ordinance and order their correction is unconstitutional.

Statement of the Case

The City of Dayton, Ohio, has a housing ordinance establishing "minimum standards governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation" (R. 44). That ordinance authorized the Housing Inspector, upon showing appropriate identification, to enter dwellings at any reasonable hour for the purpose of detecting conditions therein which would endanger the health and safety of the occupants of the dwellings or of the general public (R. 45). It imposed a penalty of up to $200 or thirty days in jail for refusal by the occupant of a dwelling to give the inspector free access thereto at a reasonable hour for purposes of inspection (R. 46).

Appellant* was living in a dwelling in the City of Dayton in the spring of 1957 when he was called upon by an agent of the City Housing Department between ten and eleven o'clock one morning (R. 29). The inspection was part of a systematic area-by-area search for housing code violations (R. 28). The Inspector produced identification and asked to enter Appellant's house (R. 22). Appellant refused to permit him access to the house, and the Inspector left (R. 22).

Appellant was subsequently notified by the City Prosecutor to appear in his office to answer a complaint against him for refusal to give the Housing Inspector access to his dwelling (R. 40). Appellant ignored this notice (R. 23), and was thereupon served with an affidavit and warrant issued by the Dayton Municipal Court charging him with violation of the inspection provision of the housing ordinance (R. 23, 74). He appeared in court and entered a plea of not guilty. Bond was set at $1,000.00, and Appellant was placed in the city jail to await trial (R. 24, 75).

That same day, Appellant's attorney filed a Petition for Writ of Habeas Corpus in the Common Pleas Court of Montgomery County, Ohio, directed against Appellee, the Chief of Police of Dayton, demanding Appellant's release (R. 75). The Petition did not state the grounds, constitutional or otherwise, upon which it was claimed that Appellant was illegally held (R. 1). Pending hearing on the Petition for Writ of Habeas Corpus, the Court ordered Appellant released from the city jail without bond.

At the hearing about two weeks later, Appellant's attorney made an opening statement to the Court (R. 15-18) in which he attacked the housing inspection ordinance gen-

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* As pointed out by the Ohio Supreme Court, *State ex rel. Eaton v. Price*, 168 Ohio St. 123, 125, 151 N.E.2d 523, 524 (1958), this case is improperly captioned. The Appellant is named Earl Taylor (R. 19), and the case should have come here as *In re Taylor*.

erally under "the Constitution of the State of Ohio, the Constitution of the United States and numerous decisions of the United States Supreme Court and the State of Ohio" (R. 18). At no time during the hearing did Appellant's attorney allege that the ordinance deprived Appellant of his liberty without due process of law, in violation of the fourteenth amendment to the Constitution of the United States (R. 15-33).

Testimony was taken at the hearing and the trial court granted the Writ of Habeas Corpus, writing an opinion which rested its decision upon the fourth amendment to the United States Constitution and article 1, section 14 of the Ohio Constitution (R. 4-13, 5). The entry of judgment by the trial court specifically declared the ordinance "violative of the Fourth Amendment to the Constitution of the United States, and Article 1, Section 14 of the Constitution of the State of Ohio" (R. 13).

Appellee appealed to the Court of Appeals of Montgomery County, Ohio, which reversed the trial court, noting that:

> "Two errors are assigned: Error in passing on the constitutionality of the city ordinance in a habeas corpus proceeding; error in holding the inspection section (806-30) of the ordinance to be violative of the Fourth Amendment to the Constitution of the United States and Article I, Section 14 of the Constitution of the State of Ohio" (R. 48).

The Court of Appeals decided the federal question upon the fourth amendment alone, without reference to the fourteenth amendment since it had not been raised (R. 47-64). The opinion held that the fourth amendment has no application to the states (R. 52). Even the dissent did not mention the fourteenth amendment (R. 64-68). The entry of judgment declared the inspection ordinance not

violative of the fourth amendment to the Constitution of the United States or of article I, section 14 of the Constitution of Ohio (R. 68).

Appellant appealed to the Supreme Court of Ohio. In his assignments of error, he omitted any reference to the fourteenth amendment. And in his Brief, he specifically rejected the fourteenth amendment as a ground for his appeal in attempting to distinguish *Givner* v. *State*, 210 Md. 484, 124 A.2d 764 (1956), a case upholding the constitutionality of the Baltimore health inspection ordinance:

> "The Court held 'that the inspections herein involved are not unlawful as violative of the Fourteenth Amendment', so that case was decided on different constitutional provisions than we have in Ohio and was a question of whether or not the Fourteenth Amendment to the United States Constitution applied in that particular case." Appellant's Brief to Ohio Supreme Court, p. 36.

The Ohio Supreme Court affirmed the Court of Appeals, noting in its opinion:

> "Condensing the assignments of error, relator contends that Section 806-30 of the Code of General Ordinances of the City of Dayton, being a part of ordinance No. 18099, is violative of the Fourth Amendment to the Constitution of the United States and of Section 14 of Article I of the Ohio Constitution." (R. 76).

The Court's decision, so far as the challenge under the United States Constitution was concerned, rested solely on the fourth amendment and its exclusive application to the federal government (R. 76). The bulk of the opinion was consumed in dealing with a non-federal question, the

court holding that the inspection ordinance was not violative of article I, section 14 of the Ohio Constitution (R. 76-90).

Appellant petitioned for rehearing. His petition, while a part of the certified record, was not designated for printing. But it, also, made no reference to the fourteenth amendment.

Appellant's first mention of the fourteenth amendment was in his Notice of Appeal to this Court (R. 91, 96).

Summary of Argument

The Supreme Court has no jurisdiction of this appeal, because the due process of law clause of the fourteenth amendment was never drawn in question by Appellant or passed on in the state courts; and because the fourth amendment, though drawn in question and passed on in the state courts, is clearly applicable only to the federal government and therefore presents no substantial federal question.

Even if the Supreme Court had jurisdiction, the decision of the Ohio Supreme Court should be affirmed. Inspections without warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, have been an integral part of the state police power in this country since pre-revolutionary days, and in Ohio and Dayton since the earliest settlements and development of law.

Periodic, area-by-area housing inspections are an essential part of municipal programs for preservation of the public health, safety, morals and general welfare. Hazardous conditions exist on the inside of houses, even when the houses are outwardly neat, clean and attractive. The majority of such conditions cannot be discovered if the inspector must have cause to suspect their existence before

entering the house, because they are not apparent from the outside. Striking down municipal housing inspections such as the one involved in this case will seriously cripple the Dayton safety and sanitation program, as well as similar programs of other cities throughout the nation. It will end, or at the least impair, the effective work which Dayton and other cities have been doing in preventing unnecessary loss of life and property, human suffering and deterioration of moral fiber, which results from fire, filth and disease.

ARGUMENT

I. The Validity of the Dayton Housing Inspection Ordinance under the Due Process of Law Clause of the Fourteenth Amendment Was Not Raised in the State Courts so as To Confer upon This Court Jurisdiction to Decide an Appeal under That Amendment.

As set out fully in the Statement of the Case, pp. 3-7 *supra*, at no time in either of the three state courts which heard and decided this case did Appellant allege that the Dayton housing inspection ordinance deprived him of his liberty without due process of law in violation of his rights under the fourteenth amendment to the Constitution of the United States. At no time did he mention due process of law. At no time did he mention the fourteenth amendment. His suit in the trial court, and his case on appeal to both the Ohio Court of Appeals and the Ohio Supreme Court, rested entirely upon the fourth amendment to the United States Constitution and article I, section 14 of the Ohio Constitution.

As also appears from the facts recounted in the Statement, none of the three state courts which heard this case decided whether or not the Dayton housing inspection ordinance deprived Appellant of his liberty without due proc-

ess of law in violation of the fourteenth amendment. All three courts expressly rested their decisions upon the fourth amendment to the United States Constitution and article I, section 14 of the Ohio Constitution. Both appellate courts noted in their opinions that these were the only errors on constitutional questions which were assigned. Both appellate courts rested their decisions that the inspection ordinance was not violative of the fourth amendment upon the ground that the fourth amendment has no application to the states.

Appellant did aver generally before the trial court that the ordinance was violative of "the Constitution of the United States." But such a broad allegation has been held by this Court to be insufficient to present to the state court a federal question under a specific claim of unconstitutionality, as required to give the Supreme Court jurisdiction on appeal. *Herndon* v. *Georgia*, 295 U.S. 441; *Capital City Dairy* v. *Ohio* ex rel. *Attorney General*, 183 U.S. 238, 248. Furthermore, Appellant's prosecution of his case through two state appellate courts made it clear that, if he intended to draw in question any specific constitutional provision when he made his reference to "the Constitution of the United States" in the trial court, it was the fourth amendment to that Constitution.

Appellant first interjected due process of law under the fourteenth amendment as a question for consideration in this case in his Notice of Appeal to this Court, filed with the Ohio Supreme Court after it had already rendered its final decision and denied an application for rehearing without being presented the fourteenth amendment question. This Court has held that it is too late to raise a federal question for the first time in assigning error after the highest court of the state has already rendered its final decision on other grounds. *White R.L. Co.* v.

Arkansas ex rel. *Applegate*, 279 U.S. 692, 699-700; *Hiawassee R.P. Co.* v. *Carolina-Tennessee P. Co.*, 252 U.S. 341.

Even if Appellant had raised the due process question under the fourteenth amendment in the Ohio appellate courts, they would not have passed on it because it was not presented at the trial level. Both the Supreme Court of Ohio and the Court of Appeals of Montgomery County have held that "a constitutional question may not be raised for the first time in a reviewing court. To be reviewed the question must have been raised and determined by the trial court." *State* ex rel. *McKay* v. *Board of Elections*, 115 N.E.2d 858 (Ohio App. 1953); *Village of Clarington* v. *Althar*, 122 Ohio St. 608, 174 N.E. 251 (1930). See also 3 OHIO JUR. *Appellate Review* §185 (1953). This Court has held that it is without jurisdiction to decide federal constitutional issues which were not raised at the trial level in accordance with the requirements of state law. *Edelman* v. *California*, 344 U.S. 357. *Accord, Ohio* ex rel. *Squire* v. *Brown*, 312 U.S. 652, in which an appeal from Ohio was dismissed "for want of a properly presented federal question," the question having been raised before the Ohio Supreme Court but not in the pleadings in the trial court. Records, Oct. Term, 1940, vol. 157.

II. The Contention That the Fourth Amendment Is Applicable to the Dayton Housing Inspection Ordinance Is Not of Sufficient Substantiality to Warrant Consideration by This Court.

The principle that the first ten amendments to the Constitution are limitations on the federal government only, and not on the states, was first enunciated by Mr. Chief Justice Marshall in *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243. It has been frequently reenunciated since that time, e.g.

Knapp v. *Schweitzer*, 357 U.S. 371, 376, and is so clear as not to require argument. In the recent housing inspection case of *Frank* v. *Maryland*, 359 U.S. 360, this Court dealt only with the alleged violation of the fourteenth amendment, although both the fourth and fourteenth amendments were urged in appellant's brief.

Since the federal question under the fourteenth amendment was not raised in the state courts, and the federal question under the fourth amendment is so clearly insubstantial as not to necessitate consideration by this Court, it is respectfully submitted that the appeal should be dismissed.

III. The Section of the Dayton Housing Ordinance Authorizing the Housing Inspector, Upon Showing Identification, to Enter Dwelling Units at Reasonable Hours to Detect Conditions Existing in Violation of That Ordinance and Order Their Correction Is Not Unconstitutional.

A. *Frank v. Maryland*

A consideration of the merits of this case requires an immediate reference to *Frank* v. *Maryland*, 359 U.S. 360, in which this Court last term upheld the constitutionality of a municipal housing inspection ordinance. Appellant has recognized that the *Frank* case "is similar to the facts in this case at bar" and that it "involves substantially the same problems presented by this appeal." Jurisdictional Statement, pp. 4, 20. Four justices of this Court have already expressed their opinion that the similarity is so great as to make the *Frank* case "completely controlling" upon this case. *Ohio* ex rel. *Eaton* v. *Price*, 360 U.S. 246, 248 (memorandum of Justices Frankfurter, Clark, Harlan and Whittaker opposing noting of probable jurisdiction).

It cannot be thought that this Court would now consider overruling its carefully considered decision in *Frank* v. *Maryland*, rendered just seven months ago "after thorough discussion at the bar and in the briefs and after the weightiest deliberation within the Court." *Id.* Excepting decisions on rehearing, the Court has only once in its entire history overruled a prior decision in less than a year. Blaustein, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 160 (1958). And that single instance was in connection with a vacation on rehearing the same day of the case overruled. *Murdock* v. *Pennsylvania*, 319 U.S. 105, overruling *Jones* v. *Opelika*, 316 U.S. 584, vacated 319 U.S. 103. Rehearings, of course, are granted only "at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court." RULE 58(1). Neither of these requisites was present when the Court agreed to review this case, and in fact a petition for rehearing in the *Frank* case was denied. 360 U.S. 914. An overruling of *Frank* v. *Maryland* in the circumstances of this case would be contrary to the spirit of Rule 58(1), become an historical "first" in short reversals, and seriously undermine the reliance which members of the bar and the general public have a right to place in the decisions of this Court.

B. Nature of the Dayton Ordinance

The purpose of the Dayton housing ordinance is stated at length in its preamble. See Appendix, p. 26 *infra*. Generally speaking, it is to establish and maintain minimum standards for housing as pertains to structural safety, fire prevention, and health and sanitation. Many requirements are spelled out in detail in the ordinance, and others are left to the discretion of an administratively appointed Housing Inspector, to be exercised in accordance with the general

standards of the ordinance. Since the setting of minimum standards is valueless without some means of detecting violations, the Housing Inspector is given the power to inspect dwellings, with a penalty provided for refusal of the right of entry. The housing ordinance, and the inspection provision in particular, are enacted by the City of Dayton under the police power of the State of Ohio, delegated to it by Ohio Const., art. XVIII, § 3; Ohio Rev. Code §§ 715.03, 715.26.

The inspection provision in the housing ordinance is immediately followed by a section requiring that, if a violation is detected, the person responsible shall be given a written notice of the violation, ordering "remedial action which, if taken, will effect compliance with the provisions of this ordinance." The same section states that the notice shall "specify a reasonable time for performance." Section 806-31. Thus, no criminal penalty is attached to maintaining a violation which the inspection discloses. It is only if the occupant fails to correct the violation after notice that he becomes subject to a criminal penalty. This is precisely the procedure under the Baltimore Health Code, upheld in *Frank* v. *Maryland*, and the language of the Court in that case is fully applicable here also:

> "The attempted inspection of appellant's house is merely to determine whether conditions exist which the Baltimore Health Code proscribes. If they do appellant is notified to remedy the infringing conditions. No evidence for criminal prosecution is sought to be seized. Appellant is simply directed to do what he could have been ordered to do without any inspection, and what he cannot properly resist, namely, act in a manner consistent with the maintenance of minimum community standards of health and well-being, including his own." 359 U.S. 360, 366.

C. Historical Perspective

The Dayton housing ordinance provides for inspection without a warrant as an adjunct to a regulatory scheme for the general welfare of the community, and not as a means of enforcing the criminal law. As pointed out by this Court in the *Frank* case, *id.* at 367-68, such inspections have antecedents deep in our history. The Court cited a number of examples of such inspections without warrants in the laws of the colonies, including Virginia, which claimed the territory that is now Ohio.

At the time the United States Constitution was adopted, Ohio was still unsettled and largely unexplored. But, as written by a former Chief Justice of this Court and a son of Ohio, Salmon P. Chase, "When the settlers went into the wilderness, they found the law already there." Chase, *Preliminary Sketch of the History of Ohio*, reprinted in HISTORY OF MONTGOMERY COUNTY, OHIO 204, 210 (W. H. Beers & Co. 1882). The reference was to the famous Ordinance of 1787, enacted by Congress while the new Constitution was under discussion in Convention, to provide a government for the Northwest Territory. 1 U.S.C., vol. 1, p. xxxv (1952). Although articles I and II of the Ordinance of 1787 contained a Bill of Rights for the new territory, with language foreshadowing many of the provisions of the new Constitution then being drafted, there was no provision against unreasonable searches and seizures. Section II of the Ordinance, however, provided that all inhabitants of the territory should be entitled to "judicial proceedings according to the course of the common law," and that "no man shall be deprived of his liberty or property, but by . . . the law of the land."

The first few laws for the new territory were adopted by the appointed governor and judges, and included "An

Act Regulating the Enclosure of Ground," which provided for the appointment of viewers to go on adjoining land-holdings and determine the value of a common wall for the purpose of assessing one-half against each owner. N.W. Terr. Laws, 1788-91, ch. XXII, § IV.

The first territorial legislature convened in 1800, and the following year passed an act allowing a person owning land jointly to petition for partition, whereupon commissioners would be appointed to divide the land. The act provided:

> "And it shall be lawful for the said commissioners, their agents or associates, to enter upon, pass over or survey any enclosure or tract of land, within or adjacent to the tract or tracts to be divided as aforesaid, doing as little injury to the owner or owners thereof as circumstances will permit." N.W. Terr. Laws, 2d Assy., 1st Sess., ch. VII § 6 (Dec. 23, 1801).

Ohio became a state in 1802, and its new Constitution adopted that year contained a search and seizure provision similar to the fourth amendment to the United States Constitution and article I, section 14 of the present Ohio Constitution. Ohio Const. art. VIII, § 5 (1802). The enactments of the early sessions of the state legislature, however, showed that the historical purpose of such provisions, to protect against searches as a means of enforcing the criminal law, was intended in Ohio also.

The first session of the new state legislature provided for election of justices of the peace; Ohio Laws, 1st Sess., ch. XXVIII (Apr. 16, 1803), and the second session enacted a statute prescribing their duties in detail and setting out forms for their use. Ohio Laws, 2d Sess., ch. XXX (Feb. 18, 1804). The form of a search warrant, written into § 2 of

the statute, made it clear that warrants were intended for use where *criminal evidence* was sought:

"Form of a search warrant

"The state of Ohio,
County, ss:

"To any constable in the township of
(L.S.) Whereas it appears to me, AB, one of the justices of the peace in and for the township of
in the county aforesaid, that the following goods and chattels, to wit: (here describe the property or articles) have within days last past, by some person or persons unknown, been feloniously taken, stolen and carried away, out of the house of the said CD, at the township and county aforesaid, and that the said CD doth verily believe that the said goods, or a part thereof, are concealed in the dwelling house of EF, at in said county: These are therefore, in the name of the people of this state, to authorize and require you, with the necessary and proper assistance, to enter, in the day time, into the said house of the said EF, at aforesaid, in the county aforesaid, and there diligently to search for the said goods and chattels, and if the same, or any part thereof, shall be found, upon such search, that you bring the goods as found, and also the body of the said EF, forthwith before me or some other justice of the peace for said county, to be disposed of and dealt with according to law.

"Given under my hand and seal, the day of

"AB"

Substantially the same form of a search warrant, providing for search for *criminal evidence*, was reenacted by subsequent legislatures. Ohio Laws, 3d Assy., ch. II, § 2 (Feb. 12, 1805); Ohio Laws, 7th Assy., ch. II, § 2 (Feb. 18, 1809).

Housing inspection for sanitation and safety is a product of a developed, and primarily of a municipal, economy. Laws providing for such inspections could not be expected in pioneer Ohio. But there were other aspects of the economy of the young state which required entries on private property and searches of private goods without a warrant, and these were provided for. For instance, roads were needed and the legislature empowered supervisors to "enter upon any lands adjoining or near to the public roads within their respective districts, to make such drains or ditches through the same as he or they may conceive necessary to draw the water from the roads," with provision for further entries as needed to keep the drains open. Ohio Laws, 2d Sess., ch. XXVIII, § 13 (Feb. 17, 1804). Compare early Maryland laws cited by this Court in *Frank* v. *Maryland*, 359 U.S. 360, 369 nn.9 & 10.

An agricultural trade was also developing, and the third session of the legislature enacted "An Act Providing for the Inspection of Certain Articles of Exportation Therein Enumerated." Ohio Laws, 3d Assy., ch. XI (Feb. 20, 1805). All wheat and rye flour, corn meal, pork and beef, and other products to be exported from the state were required to be inspected and marked according to their quality. No criminal penalty was attached to possessing or exporting goods marked as of unmerchantable quality, so long as the goods were inspected and the mark displayed, and no warrant was required for the inspection. The inspections were extended to other export items by subsequent reenactments. Ohio Laws, 10th Assy., ch. XIX (Jan. 15, 1812); Ohio Laws, 17th Assy., ch. XXVI (Jan.

21, 1819); Ohio Laws, 18th Assy., ch. X (Feb. 7, 1820). Compare early Maryland laws cited by this Court in *Frank* v. *Maryland*, 359 U.S. 360, 369 n.11.

The City of Dayton was incorporated in 1805, a village of about a hundred persons. It grew gradually and by 1846 had reached a population of almost 10,000. HISTORY OF MONTGOMERY COUNTY, OHIO 599 (W. H. Beers & Co. 1882). In 1846 the city passed its first housing inspection ordinance, which provided as follows:

> "AN ORDINANCE for preventing and extinguishing fires within the city of Dayton.
>
> (Passed April 17, 1846)
>
> "* * *
>
> SEC. III. And the said wardens and each of them, are hereby authorized to enter any house or building, lot, yard or premises, in this city, between sun rising and sun setting, on any week day, for the purpose of examining any fire places, hearths, chimneys, stoves or stove pipes, ovens, boilers, kettles, or other apparatus or fixtures, which may be dangerous in causing or promoting fires: and when they shall be satisfied any danger is likely to occur from any apparatus, fixture, fire place or thing aforesaid of fires taking place, they, or any two of them shall direct in writing, the owner, agent or occupant of any premises containing any of the dangers aforesaid, to remove, alter or amend the same, in such manner and within such time as they, or either two of them may deem reasonable and just. And any person or persons who shall resist the entrance of the fire wardens, or any of them, as aforesaid, into any premises as aforesaid, or shall neglect or refuse to attend to the directions given for altering, amending or removing any of the dangers aforesaid, shall forfeit and pay for every such offense

any sum not exceeding fifty dollars and costs, to be recovered by suit before the mayor. And the further sum of two dollars and costs to be recovered by suit before the mayor, for every day he, she, or they shall suffer the same to remain after the reasonable time as aforesaid." DAYTON, OHIO CODE OF 1862 ch. 46.

For comparative purposes, the Baltimore housing inspection ordinance of 1801, quoted by this Court in *Frank* v. *Maryland*, 359 U.S. 360, 369, was enacted when Baltimore was 31 years older and 2½ times as populous as Dayton when it enacted its first inspection ordinance. See 3 *Encyclopedia Americana* 114, 118 (1957 ed.). Dayton has enacted many other ordinances providing for the inspection of private dwellings. CODE OF 1862: ch. 15, § II (Apr. 24, 1846—gunpowder inspection); CODE OF 1907: p. 170 (Jul. 14, 1873—health inspection); CODE OF 1913: p. 23 (Aug. 29, 1890—fire inspection); CODE OF 1940: § 803 (Apr. 15, 1914—sanitary inspection), § 1001 (Mar. 18, 1914—fire inspection); § 831 (Oct. 28, 1925—health inspection), § 225-34(c) (Feb. 10, 1932—building use inspection). The housing inspection ordinance challenged in this case was enacted in 1954. If, as this Court suggests in *Frank* v. *Maryland*, 359 U.S. 360, 370, there is constitutional significance in "a long and consistent history of state practice," then the foregoing review of the historical practice in the State of Ohio and the City of Dayton shows that inspections without warrant, other than as a means of obtaining criminal evidence, have been an integral part of the police power of the state since the birth of its laws.

D. Safeguards

This Court also pointed out, in the *Frank* case, *id.* at 366-67, that the Baltimore inspection ordinance contained certain safeguards designed to make the least possible

demand on the individual occupant and to cause only the slightest restriction on his claim of privacy. Three such safeguards were noted: (1) The ordinance required cause to suspect a nuisance existed within the dwelling; (2) it required inspections to be made in the day time; and (3) it gave no power to the inspector to force entry. Under the Dayton ordinance, inspections are required to be made at a "reasonable hour," and in fact the attempted inspection involved in this case took place between ten and eleven o'clock in the morning. The Dayton ordinance gives the inspector no power to force entry. So it contains two of the three "safeguards" of the Baltimore ordinance, and contains a safeguard which the Baltimore ordinance does not, in that it requires the inspector to produce identification before entering. But the Dayton ordinance does not require cause to suspect a violation of the housing code before entering, and Appellant has contended in his Brief, p. 11, that that fact distinguishes this case from the *Frank* case, and is reason for a different result.

E. Cause to Suspect

The Dayton housing inspection program, like municipal safety and sanitation programs all over the nation, is not based merely upon following up complaints and checking buildings which give external evidence of hazards within. By the time a health hazard begins to smell, or a fire hazard to smoke, it is usually too late. A nest of disease-carrying rats in the cellar, a pile of inflammable oily rags in the attic, a frayed electric wire or overloaded outlet, a leaking motor on a boiler—these are conditions which, except for rare instances, the inspector has no cause to suspect before entering the house.

The inadequacy of inspections on probable cause to protect the health and safety of a community is illustrated

by the results of a test survey conducted by a grand jury in New York City convened to investigate hazardous and unsanitary conditions in housing. An inspection team surveyed fifteen square blocks of housing in three representative areas of Brooklyn, from which had come complaints of 567 housing division violations. The inspection survey revealed an actual total of 12,445 violations in the test area, many of which were classed as "hazardous." Other New York City inspections indicated that this ratio (approximately 1 to 22) was not out of line. GRAND JURY PRESENTMENT, "In the Matter of the Investigation of the Enforcement of Any and All Laws Concerning Hazardous and Unsanitary Conditions in Dwellings, etc.," Kings County Court, N. Y., pt. 1, pp. 6-8 (Jan. 28, 1953).

An illustration in Dayton of the inadequacy of housing inspection which requires probable cause can be had in the campaign under the ordinance here challenged to reduce deaths from unvented gas space heaters. See Dayton Daily News, Nov. 12, 1959, p. 32, col. 1. Four years ago, sixteen Daytonians died because they used such defective heaters. Three years ago there were nine such deaths. There were two fatalities in each of the last two winters, and it is hoped that in future years, through the maintenance of an adequate program of housing inspection, such needless deaths can be ended entirely. The records of the City of Dayton show that last year alone there were 2,912 gas heater violations found on inspection. Ten of these violations were so serious that the utility company furnishing gas had to be called for an immediate shutoff. But in no case could cause to suspect the existence of such defective heaters be had before entering the house.

Tragic as are the deaths caused by unvented gas heaters, they do not furnish the best argument for effective inspection. For the danger from such heaters is primarily to

the house occupant. Innocent family members and unwitting visitors are, of course, also endangered. But in the case of housing violations which produce fire and disease, the danger from refusal of entry by a building occupant like the Appellant can endanger the health and safety of the entire community.

The Dayton inspection program, like municipal inspection programs all over the country, is grounded on the concept that it is through the prevention of conditions which result in health and safety hazards, accomplished by systematic area-by-area searches, that the public welfare is best protected. These inspections are part of a scientific program to educate the householder to abate dangerous conditions before the hazard progresses to the point where it can be detected outside the house.

If housing inspection ordinances are only valid when they require probable cause, then they apply the same test as a magistrate in issuing a warrant authorizing a search for criminal evidence. Except that these inspection ordinances would eliminate the inconvenience of obtaining the search warrants, the probable cause requirement would as effectively cripple the municipal health and safety inspection programs as if a search warrant were required. This Court has already held in the *Frank* case that the requirement of probable cause in searches under warrant for criminal evidence is not, and should not be, applicable to inspections of the kind here involved.

Although this Court in the *Frank* case cited the requirement of probable cause in the Baltimore ordinance as one of the safeguards provided by that law, the rest of the opinion shows that the validity of the ordinance was not made to rest upon that requirement. In fact, the Court specifically recognized the validity of systematic area-by-area searches such as that involved here, a

well as of searches like the one in the *Frank* case to treat a specific problem which the inspector had cause to suspect:

> "Time and experience have forcefully taught that the power to inspect dwelling places, either *as a matter of systematic area-by-area search* or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the safeguards necessary for a search of evidence of criminal acts." *Frank* v. *Maryland*, 359 U.S. 360, 372. (Emphasis added).

F. Other Possible Distinctions

Other distinctions urged by Appellant, Brief, pp. 10-11, require only passing mention. The fact that Appellant's home was neat, clean and attractive on the outside was not an assurance that there were no violations of the housing code inside. And the fact that Appellant was of the opinion that the inside of his house was clean and in good condition could likewise not prevent inspection. The city has, in the reasonable exercise of its police power, determined that the decision as to whether there are housing code violations is to be made by the Housing Inspector, and not by each individual householder.

The fact that the Inspector did not take time to enumerate the violations for which he wished to search is no reason to invalidate the inspection. The Inspector identified himself to the Appellant. Appellant is presumed to know the law, and the conditions for which the Inspector was looking were set out at length and in detail in the Dayton housing ordinance. For the Inspector to stop and run through every possible violation for each housing occupant before entering to make his inspection would be administratively infeasible.

G. Possibility of Abuse

The inspection involved in this case was in every sense reasonable. There is nothing to suggest that the Inspector attempted to enter Appellant's house by force, or that he was abusive in any manner. The inspection was not made at an unreasonable hour, and there is no suggestion of any motive on the part of the Inspector other than to carry out his carefully defined duties under the housing ordinance. Nor does it appear that Appellant was harassed by repeated and unnecessary inspections. The Inspector identified himself, asked permission to enter, and when permission was denied he left. All this appears, even from the transcript of testimony, in Appellant's own words. An affirmation of this case will not open the door to high-handed action by petty governmental officials. So long as the courts sit, there is a remedy for abuses of the power to conduct municipal inspections if they should ever transpire.

Conclusion

From the foregoing argument on jurisdiction, it appears that the validity of the Dayton housing inspection ordinance under the fourteenth amendment was never drawn in question or passed upon by the state courts. The inapplicability of the fourth amendment to the ordinance is so clear as to render insubstantial any federal question raised thereunder. The appeal should therefore be dismissed.

Moreover, even if the appeal is not dismissed, (1) a reexamination of the considerations which led this Court last term, after full briefing and argument and thorough deliberation, to establish the constitutionality of municipal housing inspections; (2) a review of the history in Ohio and Dayton of inspections without warrant for

purposes other than to enforce the criminal law; (3) a consideration of the impossibility of conducting adequate housing inspection programs under a law which requires cause to suspect the existence of a hazard inside the house while standing outside; (4) an appraisal of other factors claimed to distinguish this case from the *Frank* case; and (5) a weighing of the slight inconvenience to the individual caused by reasonable housing inspection against the tremendous benefit to the community in helping to prevent death and suffering, property damage and moral deterioration—all lead to the conclusion that the decision of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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Counsel for Appellee.

APPENDIX

HOUSING ORDINANCE

* * * * * * *

DEPARTMENT OF SERVICE AND BUILDINGS
DIVISION OF BUILDING INSPECTION

HAROLD NIELSEN, Superintendent
LESLIE HITEMAN, Chief Housing Inspector

Dayton, Ohio
1955

AN ORDINANCE

Establishing minimum standards governing utiliti facilities and other physical things and conditions essenti to make dwellings safe, sanitary and fit for human habit tion; establishing minimum standards governing the co ditions and maintenance of dwellings, dwelling units, roo ing houses and rooming units; fixing certain responsibi ties and duties of owners, operators and occupants dwellings, dwelling units, rooming and boarding hous and rooming units; requiring permits for the operation rooming and boarding houses and establishing fees ther for; establishing a Bureau of Housing Inspection and Slu Prevention in the Division of Building Inspection a establishing a Housing Appeals Board; fixing the powe and duties of the Housing Inspector for administrati and enforcement of the ordinance; authorizing the adopti of rules and regulations by the Housing Inspector to car out the provisions and purposes of the ordinance; author ing the inspection of dwellings, the rehabilitation of dwe ings and the vacation and removal of dwellings unfit f human habitation; and providing penalties.

WHEREAS, In the City of Dayton there are dwellings a rooming houses which are so dilapidated, unsafe, dang ous, unhygienic or insanitary as to constitute a hazard a menace to the health, safety, morals and welfare of the re dents of such dwellings and rooming houses as well as the people of the City of Dayton; now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON

* * * * * * *

Section 806-30. ENTRY AND INSPECTION OF DWELLINGS.

(a) The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey.

(b) Every occupant of a dwelling shall give the owner thereof or his agent or employee access to any part of such dwelling or its premises at any reasonable hour for the purpose of making such repairs or alterations as are necessary to effect compliance with the provisions of this ordinance or any lawful order issued pursuant to the provisions of this ordinance.

(c) No officer, agent, or employee of the City of Dayton shall render himself personally liable for any damage that may accrue to persons or property as a result of any act required or permitted in the discharge of his duties under this ordinance. Any suit brought against any officer, agent, or employee of the City of Dayton as a result of any act required or permitted in the discharge of his duties under this ordinance shall be defended by the City Attorney until the final determination of the proceedings therein.

* * * * * * *

Section 806-83. PENALTIES

Any person who shall violate any provision of this ordinance shall, upon conviction, be punished by a fine of not less than twenty dollars' ($20.00) nor more than two hundred ($200) or by imprisonment of not less than two (2) days nor more than thirty (30) days, or both, and each day of failure to comply with any such provision shall constitute a separate violation.

Passed by the Commission November 10, 1954.

Signed by the Mayor November 10, 1954.

HENRY S. STOUT,
Mayor of the City of Dayton, Ohio.

Attest:

OSCAR F. MAUCH,
Clerk of the Commission.

FILE COPY

DEC 7 1959

JAMES R. BROWNING, Cle

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 30

OHIO EX REL. EATON,

Appellant,

v.

PRICE, CHIEF OF POLICE,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS.

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BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS.

Interest of Amici Curiae

The National Institute of Municipal Law Officers (NIMLO) is an organization composed of more than eleven hundred municipalities located in each of the fifty states, the District of Columbia and Puerto Rico. Each member city acts through its chief legal officer, known variously as

City Attorney, City Solicitor, Corporation Counsel, Direc
tor of Law, etc.

This brief is filed pursuant to rule 42(4) of this Court
The members of NIMLO are political subdivisions of state
and this brief is sponsored by their uthorized law officers

The issue presented in this case is of vital interest no
only to the City of Dayton but to all municipalities whic
seek to prevent health and fire hazards and exercise othe
necessary police power functions under ordinances provid
ing for reasonable inspections of private houses. The issu
is also of vital interest to the millions of inhabitants o
those municipalities whose life and health and propert
are protected by such inspections.

The members of NILMO were represented by brie
amici curiae and also in oral argument in the first case pr
senting to this Court the issue of the constitutionality o
municipal housing inspection, *District of Columbia* v. *Littl*
339 U.S. 1 (constitutional issue not decided). They wer
also represented by brief amici curiae in the landmark cas
of the past term in which this Court sustained the consti
tutionality of reasonable municipal housing inspection
Frank v. *Maryland*, 359 U.S. 360. It is because of the co
lective experience of the NILMO municipalities with th
necessity for reasonable inspection ordinances, and thei
awareness of the danger which is posed to the health, safety
and general welfare of their respective communities b
attempts such as this to invalidate those ordinances, tha
this brief amici curiae is filed.

Preliminary Statement

The Amici Curiae are aware of the contention by Appe
lee that this Court has no jurisdiction of the appeal becau
the federal question was not properly raised in the sta
courts, and they agree with that positon. However, I

cause of the grave consequences which an adverse decision on the merits of this case would have to their housing safety and sanitation programs, they submit this brief for consideration by the Court in the event that it should find that it has jurisdiction and proceed to decide the merits of the controversy.

Summary of Argument

The rights guaranteed by the Constitution are not absolute. In the case of the right to privacy under the fourth amendment, only *unreasonable* searches are prohibited. The same limitation, though not in specific terms, applies to the right to privacy under the fourteenth amendment. Whether a search is or is not unreasonable depends upon a balancing of all interests for and against allowing the search. In this case, the interest of all the people in guarding the public health and safety outweighs the interest of the individual householder in being free from the slight inconvenience caused by reasonable municipal housing inspection. Housing inspections are not unreasonable searches within the meaning of the fourth or fourteenth amendments.

ARGUMENT

I. Constitutional Prohibition Only on Searches Determined To Be Unreasonable After Consideration of All Interests.

The civil liberties guaranteed by the Constitution are not absolute. They are subject to reasonable limitations in the exercise of the police power of the state. *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 398-99. This Court has said:

> "We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put

it, 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.'" *Id.* at 399.

Moreover, the guarantee of individual freedom in the fourth amendment is by its language specifically qualified. It is not an absolute prohibition on searches of houses. It prohibits only "*unreasonable* searches." (Emphasis added.)

The same limitation must be read into the due process of law clause of the fourteenth amendment. The determination of whether housing inspection under the Dayton ordinance is an *unreasonable* search within the spirit of the Constitution will depend upon a balancing of interests between the right of an individual to privacy in his own home and the right of a municipality to guard the health and welfare of all its people through the exercise of its police power. It is to this balancing of interests that the Amici Curiae wish to direct their argument. Because of the collective experience of more than eleven hundred NIMLO member cities all over the nation in fire prevention and sanitation, the Amici Curiae feel particularly qualified to bring to the attention of this Court the gravity and importance of the public interest in the preservation of reasonable inspection ordinances.

II. Public Interest in Preservation of Housing Inspections

Housing inspections cannot be made from a courthouse. It is not a question primarily of the inconvenience involved in procuring a warrant every time there is a complaint as to unsanitary or unsafe conditions. The fact is that the public cannot be protected merely by following up warrantable complaints. The major public health and safety pro-

grams in this country are grounded on the concept that it is through prevention of conditions which result in health and safety hazards, and not in the punishment of violators, that the public welfare is best protected.

A reversal of the decision of the state court in this case would destroy the systems of preventive inspections now set up all over this country, and would make housing inspectors mere process servers for the purpose of abating conditions which have already grown to the stature of public menace. Effective health and safety administration is not based upon complaints, but is the result of periodic scientific checks by trained inspectors to determine health and safety conditions. This is amply illustrated by the results of a test survey conducted by a grand jury in New York City convened to investigate hazardous and unsanitary conditions in housing. Surveyed by an inspection team were fifteen square blocks of housing in three representative areas of Brooklyn, in which 567 housing division violations had been previously reported on complaint. The inspection survey revealed an actual total of 12,445 violations in the test area, many of them classed as "hazardous." Moreover, other New York City inspections indicated that this ratio was not out of line. GRAND JURY PRESENTMENT, "In the Matter of the Investigation of the Enforcement of Any and All Laws Concerning Hazardous and Unsanitary Conditions in Dwellings," etc.," Kings County Ct., N.Y., pt. 1, pp. 6-8 (Jan. 28, 1953).

Only 567 violations on file prior to the test inspection as against 12,445 violations after the test! Can there be any doubt of the need for regular preventive inspections?

Programs of preventive inspection similar to that conducted by Dayton have drastically reduced fire hazards in countless other cities in this country. These inspections have been part of a scientific plan to educate the house-

holder into avoiding catastrophe rather than confining municipal efforts to extinguishing fires after they have occurred.

There is the same need for inspection in connection with garbage and rodent nests, two of the greatest sources of the spread of disease in this country. If the health officers of all the cities of the country are to wait for the complaints of neighbors and then issue warrants predicated upon the information received, the effective work that is being done in preventing epidemics in this country will henceforth be curbed. For every neighbor who complains, there are hundreds who are unwilling to become involved in a backyard fight to preserve the health of the community, others who are phlegmatic to the danger, and still others who are joint offenders.

The Baltimore Health Department made 36,119 housing sanitation inspections in the year 1958. *Frank* v. *Maryland*, 359 U.S. 360, 372 n.16. The annual report of the Chicago Fire Department for 1958 shows that in that year it inspected 122,386 residential buildings in a special program to combat accelerated fire incidence in certain dwelling areas. Los Angeles city records for the fiscal year 1958-59 show that in that year it conducted 115,850 fire prevention residential inspections, 14,586 sanitation inspections of dwellings, and 20,776 housing rehabilitation and conservation inspections. Cities maintain these inspection programs because their people feel they are necessary to protect the general health and safety.

The local governments of this nation spent $1.5 billion last year on sanitation activities. Dept. Comm. Bur. Census Rep., "Summary of Governmental Finances in 1958," p. 8 (Aug. 29, 1959). It is not just the zeal to render a public service that impels cities to maintain these costly sanitation programs. It is the recognition of the fact that the

control of garbage is the primary step in the control of certain very serious diseases. For example, the danger of typhus, where the infection results from the bites of insects borne by rats, is tremendously increased where the garbage sanitation is not adequately controlled. The same danger exists where housing inspectors are not allowed to inspect dwellings such as Appellant's for rodent infestation and other health hazards.

Possible health or safety hazards in Appellant's house are not Appellant's business alone. Fires ignited by safety hazards which might have been uncovered by municipal inspection spread to adjoining houses, and have been known to level entire city blocks. Rodents which breed in filth do not stay at home, nor do the disease germs which they spread. A man's home may be his castle, but that castle no longer sits on a hill surrounded by a moat. The modern "castle" is connected to a central water system, a sewage system, a garbage collection system, and frequently to the houses on either side.

The case of the open garbage can may not be as intriguing to students of constitutional law as a case involving freedom of speech and assembly, but the assemblage of rodents and germs can have equally far reaching effect. A colony of rats is capable of increasing at the rate of six percent per day. One germ, after thirty divisions, becomes one billion germs—a formidable armed enemy. This is not fanciful, but realistic. To municipal officers, in constant touch with health and safety problems, it is impossible to shrug off the very real dangers that lurk in the everyday problems of sanitation.

The practical administrative obstacles to operating inspection systems under laws which require cause to suspect a violation of the housing code before entering the house cannot be urged too strongly. It just cannot be done

that way. Cause to suspect would be present only in that portion of cases where complaints have been received or where a nuisance situation has reached the point where it can be seen or smelled from outside the building. Olfactory health control is no answer to the major health problems of this country. The violations that smell represent too small a portion of the whole. By the time putrefaction sets in, very valuable time has been lost and an emergency phase has begun. The whole public health program is predicated upon the basic principle that improper practices must be corrected and abated *before* they reach the stage of glaring danger.

If housing inspection ordinances are invalidated, countless cases of defective household plumbing which inspections would discover will be permitted to continue uncorrected. Defective plumbing may cause back-siphonage of sewage and other household wastes into the public water supply. The amoebic dysentery epidemic in Chicago in 1933, resulting in 100 deaths in over 1,000 known cases, was caused by just such a situation. *Amoebic Dysentery in Chicago*, 24 Am. J. Pub. Health 756 (1934). Water is also a vehicle for the dreaded diseases of cholera and typhoid fever.

The invalidation of housing inspection ordinances would prevent the effective checking of electrical work for fire hazards, or of hot air furnaces to determine whether proper combustion is achieved so as to prevent the escape of noxious gas. It is worth noting that about two years after the attempted inspection in *District of Columbia v. Little*, 339 U.S. 1, a fire gutted the home of the respondent and burned to death her two-year-old child. Washington Star, Aug. 6, 1949, p. A-20, col. 1; Aug. 7, 1949, p. A-7, col. 7. While the cause of the fire was reported as undetermined, the incident

serves as a grim reminder of the kind of loss that can frequently be prevented by municipal inspection.

Field inspections also play a vital role in urban redevelopment and slum clearance. D. C. Dept. Licenses & Inspections Rep., "Housing Code Enforcement" (Dec. 24, 1958). Federal government statistics show that slums, which constitute only 20% of the total residential area of the average American city, produce 35% of all fires, 45% of major crimes, and 50% of disease. *Id.* at 23. In the important case of *Berman* v. *Parker*, 348 U.S. 26, 32, this Court recognized that:

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden."

III. Interest of Individual Householder In Absolute Privacy

The *reasonableness* of the search involved in this case depends upon a balancing of interests. It has been shown that the interest of the people—acting through their agents, municipalities—in exercising police power through health and safety inspections is grave indeed. What are the interests of the individual householder in maintaining an absolute right of privacy in his home against such inspections?

It should be noted initially that most householders feel their interests lie in permitting such inspections, and welcome the periodic visits of municipal inspectors which they know can uncover hazards the correction of which may save their lives by stopping fire or disease. Yet what of a householder who, like Appellant, feels differently? What are the dangers to such a householder if inspection is allowed?

Unlike the householders in *all* cases in this Court where searches have been declared unconstitutional, this householder is subject to no criminal prosecution. The inspecting official is not looking for evidence of a crime. Under the Dayton housing ordinance, as under most inspection ordinances, if a health or safety hazard is found the householder is merely notified to correct it and a penalty attaches only if he fails to comply. DAYTON, OHIO, HOUSING ORDINANCE §§ 806-31, 806-83 (1955). The result of the inspection is not that defendant is convicted of a crime because of discovered evidence, but that an unsafe condition in his home is corrected. This Court has correctly held that properly circumscribed inspections without warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, are valid. *Frank* v. *Maryland*, 359 U.S. 360.

But what of the nuisance to the householder caused by inspections? There is no contention in the instant case that the householder was harassed by repeated inspections, nor that the inspection in question was made at an inconvenient time of the day. Indeed, the ordinance under attack required that the inspection be made at a reasonable time, and the particular inspection involved was attempted to be made between 10:00 a.m. and 11:00 a.m. (R. 29). There is no contention in the instant case that the inspecting sanitarian had any motive other than the discovery of a possible health hazard. This is not the case of the knock on the door in the middle of the night, or even of interference with the family dinner hour. The rule of reasonableness which has been developed in cases passing upon due process of law (and which is specifically incorporated in the language of the fourth amendment forbidding only *unreasonable* searches) is always a protection

against the capricious action of government officials. It cannot be doubted that abuses of the health and safety inspection ordinances could be remedied if they should transpire.

IV. Balancing of Interests

When the interests are balanced, then, the scales are grossly uneven. In order to preserve the nebulous private right of the Appellant and a few others like him, this Court is asked to jeopardize the lives and health of millions of city residents the nation over. One death from fire or disease originating in a filth strewn cellar should be sufficient to tip the scales, but in fact thousands of such deaths are a realistic possibility.

The fundamental purpose of the fourth amendment was certainly to secure privacy in the home, and the due process of law clause of the fourteenth amendment also protects the right of privacy. But it must be remembered that under the police power there is lawful interference in many instances with the liberty of individuals, their right to move around and their right to use their property. Individual freedom must yield in some cases to the enforcement of reasonable regulations for the public welfare. The right of privacy in the home should not give the right to refuse entry to a housing inspector any more than the right of free speech gives the right falsely to shout "fire" in a theater, *Schenck* v. *United States*, 249 U.S. 47, 52, or the right of freedom of religion gives the right to offer a human sacrifice, *Reynolds* v. *United States*, 98 U.S. 145, 166.

Where public health is at stake, this Court has sanctioned, as against constitutional objection based on individual rights, the power of the government summarily to enter premises and seize and destroy putrid food, *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306, and

the power to provide for compulsory vaccination, *Jacobson* v. *Massachusetts*, 197 U.S. 11. Indeed, it has already recognized what the Amici Curiae urge upon it now:

> "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of safeguards necessary for a search of evidence of criminal acts." *Frank* v. *Maryland*, 359 U.S. 360, 372.

V. One Rebel a Year

The dissent in *Frank* v. *Maryland*, 359 U.S. 360, 384, suggests that "Submission by the overwhelming majority of the populace indicates there is no peril to the health program." The Amici Curiae are unwilling to accept a theory which makes the preservation of public health and safety dependent upon consistent submission by citizens to an invasion of their constitutional rights. If we believed housing inspections to be unconstitutional, we would encourage citizens to resist!

It is true that most housing occupants now welcome the periodic visits of municipal inspectors. But there are others who, while realizing the value of housing inspection, are more concerned at the moment the inspector knocks on their door with the immediate prospect of having to spend time or money to correct possible defects. Still others like Appellant, who didn't think the inspector was qualified for his position (R. 30), will refuse entry for a variety of personal reasons.

The experience of the City of Portland, Oregon, with a

program of voluntary home fire inspection indicates what can happen where entry is by consent. The records of the city for the current year (through mid-November) show that out of 43,299 calls made where occupants were at home, entry was refused in 3,234 cases. In the inspections which were made, 9,955 hazardous conditions were noted and called to the attention of the occupants.

"One rebel a year," says the *Frank* dissent, is not too great a price to pay for the right of privacy. The Amici Curiae submit that the human suffering and loss of life from fire and disease which can result from the undetected code violations of even one rebel a year are too great a price to pay for the type of privacy which Appellant seeks. That there may be a significant increase in the number of refusals of entry if this Court declares housing inspection of the kind here involved unconstitutional is a reasonable, and frightening, possibility.

Conclusion

This brief is not submitted with a desire to weaken the individual rights guaranteed to all of us by the Constitution, but in an attempt to put those rights in a proper perspective. It is earnestly submitted that it was never the intended purpose of the fourth and fourteenth amendments to prevent reasonable housing inspections to protect the public health and safety, and they should not be expanded to that point. It has been the vigilance of public housing inspectors and their well-integrated programs that have saved this country from some of the epidemics, scourges and conflagrations that would otherwise inevitably have occurred. To confine housing inspections to instances where there is reason to suspect a hazardous condition from outside the house would be to cause the preventive health and

safety programs based upon periodic scientific checks to grind to a halt in cities throughout the nation. The decision of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 30

THE STATE, EX REL. EATON, *Appellant*,

v.

PRICE, CHIEF OF POLICE, *Appellee*.

On Appeal From the Supreme Court of Ohio

APPELLANT'S SUBSTITUTE BRIEF ON MERITS

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ERRATA

INDEX:

Page ii, *Maximis* instead of *Maximus*.

Conner v. Bd. of Com., Logan Co. should be 12 F.2nd 789.

Ohio v. Lindway, 131 O. S. 166, pages should read 22, 45, 48.

State ex rel. Focke v. Kirkpatrick, 91 O. App. 131.

Wolff v. Colorado, 338 U. S. 25, add page 48.

TEXT:

Page 8, line 8 of second Par. should read *claimed*.

Page 8, line 9 of second Par. *everything*.

Page 10, line 2 of second Par. "Pleas".

Page 16, line 4 of fourth Par., delete "90" and insert "30".

Page 22, commencing with words The Appeals Court is not quotation and should not be indented.

Page 29, first line is quotation from Mr. Chief Justice Hughes and should be in quotation marks. Page reference following quotation should be (Id. 448).

Same page, second Par. should be followed by an elipsis to show break in quotation. Page reference at conclusion of quotation should be 450.

Pages 37 and 38, the words "Minimus" and "Maximus" appearing in the heading and text should read "Minimis" and "Maximis". Likewise, "minimus" in note 1, page 38, should be "minimis".

Page 45, third line under SIXTH should read "Writ".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 30

OHIO, EX REL. EATON, *Appellant*,

v.

PRICE, CHIEF OF POLICE, *Appellee*.

On Appeal From the Supreme Court of Ohio

APPELLANT'S SUBSTITUTE BRIEF ON MERITS

The filing of a substitute brief has been necessitated by the illness and death of Stanley Denlinger, Esq., former counsel of the appellant, on January 2, 1960.

OPINIONS BELOW

The opinions delivered in the courts below are as follows:

1. The Court of Common Pleas for Montgomery County, Ohio, held the Housing Inspection Ordinance of the City of Dayton violates the Fourth Amendment and Section One of the Fourteenth Amendment to the Constitution of the

United States, and Article I, Section 14 of the Constitution of Ohio, and ordered the appellant released by Writ of Habeas Corpus. The opinion of the Court of Common Pleas is not officially reported, but appears in the record (R. 4).

2. The Court of Appeals of Montgomery County, Ohio, reversed the judgment of the trial court, holding that the housing inspection ordinance is not violative of the Fourth and Fourteenth Amendments to the Constitution of the United States nor of Article I, Section 14 of the Constitution of Ohio. It further held, that a constitutional question was properly raised on an application for writ of habeas corpus in the Common Pleas Court of Montgomery County, Ohio. The decision of the Court of Appeals and the dissenting opinion are officially reported at 105 Ohio App. 57, 152 N.E. 2nd 776 (1957) (R. 47-68).

3. The Supreme Court of Ohio affirmed the judgment of the Court of Appeals. Its opinion is officially reported at 168 Ohio St. 123, 151 N.E. 2nd 523 (1958) (R. 73-90).

4. Probable jurisdiction noted *Ohio ex rel. Eaton, Appellant*, v. *Price, Chief of Police*, No. 699, 360 U.S. 246. Decided June 8, 1959.

JURISDICTION

The jurisdiction of this Court is founded upon Title 28, Section 1257 (2) (1958) U.S.C.

The appellate jurisdiction of this Court is invoked pursuant to foregoing provision of the Judicial Code, which reads as follows:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The said housing inspection ordinance of the City of Dayton (18099, Sections 806.30 and 806.83, R. 44-46, Entry and Inspection of Dwellings) is forbidden by the Due Process and Equal Protection of Laws Clauses of Article Fourteen, Section One of the United States Constitution, which provides:

> "... Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The case at bar presents substantial federal questions, as follows:

1. Does the Housing Inspection Ordinance of the City of Dayton, (18099, Sections 806.30 and 806.83, R. pp. 44-46,) purporting to authorize the Housing Inspector to enter appellant's private home and premises, without a search warrant or other process, merely upon showing of appropriate identification, exceed the Police Powers reserved to the State, and therefore, renders such ordinance repugnant to the Due Process Clause of the Fourteenth Amendment?

2. Do the sweeping provisions of the Dayton Housing Inspection Ordinance, which authorize the inspection of all private dwellings, without any showing of the existence of an emergent condition endangering the public safety, health, and general welfare, of reasonable cause of suspicion or knowledge of what they wanted to inspect merely by showing appropriate identification, constitute such an unlawful invasion of privacy of appellant's home that it violates the Due Process Clause of the Fourteenth Amendment?

3. Does the interpretation of the Dayton Housing Inspection Ordinance by Supreme Court of Ohio, upholding the constitutionality of this Ordinance violate appellant's

rights under the Due Process Clause of the Fourteenth Amendment?

4. Does the provision of the Dayton Housing Inspection Ordinance requiring appellant to give free access to his private dwelling upon showing of appropriate identification without any indication that such inspection was required for any purpose, amount to a taking of appellants life, liberty or property without Due Process of law?

5. Do the provisions of the Dayton Housing Inspection Ordinance, subjecting appellant to fine and imprisonment for refusal to admit Housing Inspectors into his private home upon mere showing of appropriate identification without the intervention of a magistrate or other judicial officer, deprive appellant of Equal Protection of Laws guaranteed by the Fourteenth Amendment?

6. Did appellant Taylor, in the courts below, fail to so raise the constitutional questions in his case, particularly the Fourteenth Amendment and the Due Process Clause thereof so that jurisdiction of this Court to raise and decide the substantial federal questions involved is now precluded?

7. Does a Federal question exist in this case?[1]

SUMMARY OF ARGUMENT

1. Under the Dayton Housing Inspection Ordinance, the Housing Inspector is authorized to enter *all* private dwellings and premises. Thus, by its express terms the Housing Inspector is given unlimited authority for free access to every private home. Such illimitable authority constitutes nothing short of license for organized snooping, under the guise of Police Power of the State.

[1] The existence of a substantial Federal Question was raised by counsel in all courts below and in briefs filed with all such courts. Such briefs do not appear in the transcript of record but have been certified and filed with the Court.

2. In the case at bar, the appellant was arrested and jailed because he refused to grant free access to his private home. The appellant demanded of the inspectors what was wrong with his house, and why they wanted to inspect it. They replied, "We have a right to come in your house, go through your house, inspect the whole inside of your house." (R. 22).

3. The only limitation upon the Housing Inspector under the Dayton Housing Ordinance here under discussion for free access in a private home is (a) at any reasonable hour, and (b) upon showing of appropriate identification. Appropriate identification, such as these inspectors undoubtably presented may be procured from any variety or novelty store for a few cents. As to the reasonableness of the hour, there is no such thing as a *reasonable hour* for entry into a private home without process issued by a magistrate or other judicial officer upon the showing of probable cause. The uniformed policeman is at all times appropriately identifiable by his badge or shield number and his hat emblem. Yet, the most zealous member of the police will not intrude himself into a private home, unless invited there, to restore order or in hot pursuit, without the authority of a warrant of arrest or a search and seizure warrant.

4. The refusal of appellant to give the housing inspectors free access to his private home subjected him to imposition of fine or imprisonment or both, without the sanction of a magistrate or other judicial officer, by the issuance of a warrant. It has been argued that a search warrant authorizing such inspections as the Housing Inspectors proposed to make of appellant's private home is inappropriate, because warrants for searches and seizures are directed solely to criminal matters and have no application whatever to civil matter. (R. 60). Judge Thomas, Judge of the Court of Common Pleas, raised and answered this question most effectively in the following language:

"The proponents of ordinances which provide for the unlimited number of inspections of private homes, at reasonable hours, contend that the execution of these ordinances does not violate the right to privacy in homes provision of the Constitution, for the reason that housing inspectors are not permitted to use force or violence in gaining admission into one's home, and the only difficulty and inconvenience that could befall one who would refuse to admit an inspector is that he merely goes to jail. Therefore, the whole arrangement is quite constitutional. This ingenious reasoning produces a distinction in methods employed, but without a difference in the end result." (Emphasis added.) (R. 11)

5. Whether the constitutionality of the Dayton Housing Inspection ordinance under the Due Process Clause of the Fourteenth Amendment was properly raised in the courts below, is of course, itself, a federal question, which this Court only can decide.

6. It is well settled that municipal ordinances like the Dayton Housing Inspection Ordinance, here under discussion, adopted pursuant to state authority constitute state actions and are within the prohibitions of the Due Process Clause of the Fourteenth Amendment.[2]

7. Likewise it is equally well settled that this Court has jurisdiction to review habeas corpus proceedings to obtain discharge from custody for violating unconstitutional state statutes.

8. The present case presents a justiciable "case on controversy" within the meaning of Article III Section two of the Constitution of the United States.

STATEMENT OF THE CASE

This is an action for a writ of habeas corpus in behalf of one Earl Taylor. The Common Pleas Court of Montgomery County, Ohio, after hearing the evidence and re-

[2] See Lovel v. Griffin and the authorities cited therein *infra* page 28.

viewing the laws pertaining thereto, discharged relator, appellant herein. Respondent, appellee herein, Paul J. Price, Chief of Police of the City of Dayton, Ohio, then appealed to the Court of Appeals for Montgomery County, Ohio, which court reversed the Common Pleas Court by a two-to-one decision. (Ib. page 2)

Taylor, appellant herein, then appealed to the Ohio Supreme Court, which sustained the Court of Appeals for Montgomery County, Ohio.

Taylor then appealed to the Supreme Court of the United States, and probable jurisdiction was noted. This was decided in an unprecedented action by this Court, which split four to four over the question and rendered three separate opinions thereon.

Appellant, Taylor, was born in Dayton, Ohio, and in 1957, when arrested, was 63 years of age. He joined the Plumber's Union in 1914 and has been a working union plumber since that date. He has never been previously in jail for any offense. Appellant has a daughter and two grandchildren who live in Dayton, but not with the Taylor's.

Earl A. Taylor and his present wife live at 130 Henry Street in Dayton. Like many Americans, the home is in the wife's name. Earl Taylor contributed some $2,500.00 toward the purchase price. The couple live alone with no rooms to rent, no tenants, and no intention of selling or moving. Their home is a four-room cottage in good, clean, safe condition.

Housing inspectors were at Taylor's home three times to inspect. They and Taylor seem to have been courteous enough to each other; no violence occurred. Taylor asked them what they wanted to inspect; the inspectors couldn't tell him and for this reason refused to let them in without a warrant. Mrs. Taylor was not present.

Earl Taylor frankly states he would let plumbing inspectors, electrical inspectors, fire inspectors, etc., into his home. But he would not let in the housing inspectors because they admittedly did not know what they wanted to see. In Taylor's opinion they were untrained and had no reasonable excuse, or at least gave none, for wanting to inspect the house.

The inspectors never had a search warrant or, if they did, failed to show it to Taylor. Taylor seemed to be uncertain as to exactly who the inspectors were although he had seen them working the neighborhood. Sometimes the housing inspectors apparently had only a yellow legal pad. On one occasion the housing inspector showed a picture on a piece of paper and quickly stuck it back in his pocket. They claimed the right to enter under the ordinance and inspect anything and everything in Taylor's home. He replied to this that they had no such right and refused to let them in without a search warrant. All of these visitations were made in the morning.

Finally, an affidavit and warrant was served on Earl Taylor, a copy of which, marked as Taylor's exhibit C, was introduced as evidence at the Common Court Pleas hearing and appears in the transcript. R, 42, 43. This warrant was from the Dayton Municipal Court. Service was made by Ohio state police officers on March 19, 1957. Mrs. Taylor, not present at the three attempted inspections, was not served.

Earl Taylor appeared, as ordered, the following Tuesday, March 26, 1957, at 9:00 a.m. When the case was called, he took the oath and plead not guilty. He asked for time to get an attorney; which was refused. The magistrate turned to the bailiff or someone standing beside Taylor and said, "Well make it $1,000.00 bond and lock him up." and Taylor was locked up.

Judging from his testimony, Taylor is not a highly educated man. Never jailed before, he seems intelligent but

a little confused as to exactly what happened in the municipal court. However he got the essential facts correct, asked for counsel, pleaded not guilty and stood up like a man. Counsel comments that the treatment given Taylor, a first offender, seems rather rough, even for such courts. He was neither drunk, larcenous nor dangerous; he merely refused to let strangers—housing inspectors—into his home. He had come to the police station of his own volition after receiving the warrant.

That afternoon a writ of habeas corpus was filed and Taylor was released from jail at approximately 4:00 p.m. The newspapers mentioned Taylor's committal.

The application for a writ of habeas corpus came up for hearing April 8, 1957. In his opening statement, counsel for Taylor among other things raised the question of the constitutionality of the ordinance. During the cross examination of Mr. Taylor, the trial Judge sustained an objection by Taylor's counsel. In explaining his ruling to the assistant city attorney, who was prosecuting, the judge explained that the constitutionality question was, in his mind, the most important phase of the case.

Taylor was the only witness at the hearing, his testimony was unimpeached. For the purposes of this case, it must be assumed to be absolutely true. When he testified that his home was first class in every particular, that is true. The complete record of the hearing in the Court of Common Pleas of Montgomery County, Ohio, including copies of all exhibits, testimony, etc., appears in the Transcript of Record. R. 14-47.

The brief filed by attorney for Taylor and the reply brief filed in Taylor's behalf both plead that the ordinance was unconstitutional and specifically plead violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. Pertinent parts of these briefs, copies of which are on file with the Clerk of this Court, are copied in the appendix to this brief. Page 42.

On May 21, 1957, the Honorable Don R. Thomas, the trial judge of the Common Pleas Court in this case, rendered an opinion declaring that Taylor was lawfully exercising his constitutional rights in refusing to admit housing inspectors. Judge Thomas specifically ruled the ordinance in violation of the Fourth Amendment to the Constitution of the United States and of a paraphrase of this amendment Section 14 of the Bill of Rights of the Constitution of the State of Ohio, which are quoted in full in the opinion. Judge Thomas ordered Earl Taylor to be released with all costs to be paid by the County Treasurer as provided by law. The opinion is not officially reported but appears in the record R. 4-13. The entry of judgment dated June 10, 1957, appears in the record. R. 13-14.

From this judgment Price appealed and the judgment of the Court of Common Please was reversed by a two-to-one decision on November 2, 1957. Judge Wiseman, organ of the Court, specifically held that the Fourteenth Amendment to the Constitution of the United States did not apply to this case, but that the constitutionality of the Dayton Ordinance was properly raised in an application for a writ of habeas corpus. Hornbeck, P. J., concurred and Crawford, J., dissented. These are reported decisions and are carried in full in the record R. 47-68.

Again the brief in behalf of Taylor plead the Ordinance was in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. These briefs are on file with the Clerk of this Court and pertinent extracts therefrom appear in the appendix. Page 43.

From the opinion of the Court of Appeals Taylor appealed to the Supreme Court of Ohio, which on June 18, 1958, affirmed the decision of the Court of Appeals. The decision is reported ibid and the decision is carried in the record. R. 73-90.

Again the brief in behalf of Taylor plead the ordinance was in violation of the Fourth and Fourteenth Amendments

to the Constitution of the United States. A brief Amicus Curiae on behalf of the Ohio Civil Liberties Union and the Dayton Civil Liberties Union likewise plead the violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. Pertinent extracts from these briefs are carried in the appendix pages 44, 47.

The Assignment of Errors filed in behalf of Taylor in the Supreme Court of Ohio plead the violation of the Constitution of the United States. It is carried on page 44 of the appendix.

From the decision of the Ohio Supreme Court, Taylor appealed to the Supreme Court of the United States. During the pendency of this appeal an effort was made in Dayton, Ohio to bring Taylor to trial on the merits. This was stopped by a petition to and an order from this Court.

This Court rendered a decision noting probable jurisdiction on June 18, 1959 ibid.

ARGUMENT

THE CASE AT BAR IS NOT CONTROLLED BY THE RULING OF THIS COURT IN FRANK v. MARYLAND

I. There Are Two Fundamental Differences Between the Frank Case and the Present One

The Frank case holds that Frank violated Section 120 of Article 12 of the Baltimore (Maryland) City Code and that the ordinance incorporated in that section is Constitutional and Frank's rights under the Fourteenth Amendment of the Constitution of the United States were not violated by the Health Inspectors of the City of Baltimore who were Acting lawfully and constitutionally under the Health Code of the City of Baltimore. A pertinent section of the Baltimore ordinance reads as follows:

> "*Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time*, and if the owner or occupier shall refuse

> or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars." (Italics ours)
>
> *Frank* v. *Maryland*, 359 U.S. 369,361

The Dayton Ohio Housing Ordinance (R. pp. 44-46), has no *provision requiring that the housing inspector in demanding daytime entry*: " . . . shall have cause to suspect that a nuisance exists in any house, cellar or enclosure . . ." The only limitations on the Housing Inspector under the Dayton Ordinance is upon showing of *appropriate identification* and the inspection must be made at *any reasonable hour*.

This is a vast difference. From time immemorial law officers have been permitted to pursue felons while in hot pursuit even into private dwelling, without a warrant. Similarly, they could enter in case of fire or other grave emergency without first securing a warrant and making a showing of probable cause. The decision in the Frank case emphasizes that complaints had been received of rodents in the neighborhood of Frank's home. As Mr. Justice Frankfurter states the facts: "In the middle of the afternoon of February 27, Gentry (an inspector) knocked on the door of appellant's detached frame home at 4335 Reisterstown Road. After receiving no response, he proceeded to inspect the area outside the house. This inspection revealed that the house was in an extreme state of decay, and that in the rear of the house there was a pile later identified as "rodent feces mixed with straw and trash and debris to approximately half a ton." During this inspection appellant came around the side of the house and asked Gentry to explain his presence. Gentry responded that he had evidence of rodent infestation and asked appellant for permission to inspect the basement area. Appellant refused—*Frank* v. *Maryland*, *supra*.

The contrast of Frank's home in Baltimore with that of appellant Taylor in Dayton is at the least appalling.

Frank's house: "was in an extreme state of decay, and that in the rear of the house there was a pile later identified as rodent feces mixed with straw and trash and debris to approximately half a ton."

Taylor's home is irrebuttably and legally established to be in first class condition in every particular (R. 19-33). Therefore his testimony is irrebuttably true for the purposes of this case. What does Taylor say?

Q. Is there any dirt or refuse or anything around your house that you would consider unsanitary?
A. No, sir.
Q. Does your house, in your opinion, meet all the requirements that you and your wife find necessary to clean, comfortable living at your residence?
A. Absolutely, yes. . . . (R. 28).
Q. Have you had any wild parties down there, or drinking to excess?
A. Absolutely not. I'd get killed if I did.
Q. Any disturbances of any kind?
A. Absolutely not. I don't fight with nobody.
Q. Are you engaged in any kind of business down there? I mean do you run a store?
A. No, sir.
Q. Is this house just a dwelling?
A. That is my private home.
Q. Did you attempt to conceal from the inspectors anything at all?
A. No, sir.
Q. Did you attempt to flee from the inspectors?
A. No. Sir, I don't run from nobody.
Q. Was the house up for sale?
A. No, sir.
Q. Did you have any intention of moving from there?
A. No, sir. . . . (R. 28, 29).
A. They were there on three occasions.
Q. And what happened?
A. Well, the first time they came there, they just came and said they wanted to come in the house and go through the house and inspect the inside of the house. They didn't have any credentials, or nothing, and that was a young fellow—don't know his name—only thing he had was just a piece of paper and he

wanted to go through the house and inspect the house, and I said, "You have nothing to show me you have got a right to go through my house." He said, "We don't have to have, according to the law passed four years ago." I said, "That don't show me that you got anything in there that you want for inspection, and, further, I don't have nothing in my house that has to be inspected." And he said, "Well, you know, according to this ordinance, that we got a right to go through your house and inspect your house." I said "No, I don't think you have, unless you got a search warrant."

Q. Did they have a search warrant?

A. No, sir, they didn't. Only thing he had was piece of yellow paper tablet like that gentleman's got over there—so he stood there and argued. I said "Until you get something to show me that you got a right to come into my house for inspection or what do you want to inspect in my house." I said then "you cannot come in." He said, "if that's the way you feel about it, we will just have to leave it up to the housing inspectors." I guess he meant down to the office. That was some young fellow. (R. 20, 21)

Q. Did you ask him (the inspector) what they were looking for?

A. Yes, sir. He couldn't tell me. He said, "I want to inspect the whole inside of your house." He couldn't show me that, and that's the reason he didn't get in (R. 22).[3]

Certainly from this testimony of the appellant, Taylor, we must accept the fact that Taylor did not want strange men coming into his home, who could not tell him what they wanted to see, and who had received no complaints about his home, admittedly first class in every particular. We submit that in taking this attitude Taylor was not acting queer or eccentric, but merely exercising his constitutional right under the Fourteenth Amendment to the Constitu-

[3] "Any search of a private dwelling without a warrant issued by a magistrate upon probable cause is forbidden by Fourteenth Amendment, except in cases of immediate major crisis." McDonald v. United States, 335 U.S. 451-455.

tion of the United States and the "Due Process Clause" thereof. That provision guarantees one of the fundamental rights of freemen everywhere, from time immemorial, to protect the sanctity of their homes from unwanted prowlers, who can state or show no just cause for wanting to enter a man's home.

Under cross-examination Mr. Taylor's testimony is the same simple truth he told on direct examination. For example:

> Q. I think you said they were there on three different occasions?
>
> A. They came there in the morning, yes.
>
> Q. Between ten and eleven?
>
> A. Between ten and eleven.
>
> Q. Were they gentlemenly, well behaved, did they attempt to force their way in or abuse you in any way?
>
> A. No. (R. Page 29)

But the appellant Taylor, nearing three score and ten and still working at his skilled trade, is no doubt more irascible than a younger man would be. If he wants to keep such people out of his home, we believe he has the constitutional right to do so.

II. The Baltimore Ordinance Carries a Civil Penalty and Is Civil. The Dayton Ordinance Carries a Criminal Penalty and Is Criminal

This second difference between *Frank* v. *Maryland* and *Ohio* v. *Price* is shown clearly in the texts of the Baltimore, Maryland, and Dayton Housing Ordinances cited *supra*, and are established in the penalty clauses of each ordinance.

The Baltimore Ordinance penalty clause reads:

"... and if the owner or occupier shall refuse or delay to open the same and admit a free examination, *he shall forfeit and pay for every such* refusal the sum of Twenty Dollars." (Italics ours)

Quoted from Mr. Justice Frankfurter's opinion, *Frank v. Maryland*, *supra*, page 361.

> Let us read, in contrast, the penalty clause of Ordinance No. 18,099, Section 806-83, the Dayton City Ordinance adopted November 10, 1954:
>
> "Any person who shall violate any provision of this ordinance shall, upon conviction, be punished by a fine of not less than twenty ($20.00) nor more than two hundred ($200.) or by imprisonment of not less than two (2) days nor more than thirty (30) days, or *both and each day of failure to comply with any such provision shall constitute a separate violation.* (Italics ours.) (R. 46).

The difference between these two ordinances is obvious. The Baltimore Ordinance is a punitive one with a civil penalty. The Dayton Ordinance, applicable in this case, is a criminal ordinance with a criminal penalty. The word *forfeit* in the Baltimore Ordinance shows its civil nature. The Dayton ordinance imposes a possible fine and imprisonment or both, with each day of failure to comply being made a separate violation, and hence is criminal in its nature.

Conceivably, if not practically, upon conviction, as was pointed out by Taylor's counsel in the opening statement before the Court of Common Pleas, the Court for each day of the continuing offense, could give Taylor 90 days in jail and $200 fine over a period of thirty days. Taylor's Counsel calculated that by then (April 8, 1957) Taylor could be fined the sum of $6,000 and jailed for nine hundred days. (R. 18.) Since the violation is continuous and cumulative, by this time Taylor's possible fine and sentence now approaches astronomical proportions.

The rules of evidence governing civil actions are materially different from those of criminal evidence. It is unquestioned that the rule in a civil action, such as the Baltimore Ordinance, provides that the plaintiff prevails by a preponderance of the evidence.

"Proof by preponderence of Evidence; rule for Civil Cases" Wigmore on Evidence (Vol. IX, Sec. 2498, Page 325.)

In a criminal action, such as the Dayton Ordinance, the rule of evidence is that the criminal *must be convicted by evidence beyond a reasonable doubt.*

Another rule of criminal evidence is that criminal statutes be strictly construed in favor of the accused as to the evidence admitted, as well as to the legality and constitutionality of the statute or ordinance itself.

"Proof beyond reasonable doubt is the rule in Criminal Cases." (Wigmore on Evidence Vol. IX, Sec. 2497, Page 316)

Gallant, aging Taylor, it seems to us, has joined the long list of martyrs who have risked much to protect the sanctity and privacy of their home from illegal and unconstitutional intrusions by persons who sought entrance for no disclosable, discernible, or lawful purpose.

In all events, there is only a superficial resemblance between the facts in *Frank* v. *Maryland* and case at bar. The Frank case is not at all controlling and is hardly relevant. Such superficial resemblances all but vanish when the two situations are compared in their true light.

A Substantial Federal Question Is Adequately Presented

Therefore, the foregoing facts and authorities being considered, we believe this Court must conclude: That a justiciable controversy[4] exists; that a substantial Federal question was and is adequately raised, that the Fourteenth Amendment and the Due Process Clause thereof is properly

[4] A more complete discussion and supporting authorities appears *infra*, at page 27 as to what constitutes a justiciable "case or controversy"; within the meaning of Article III, Section Two of the Constitution.

before this Court which can consider city ordinances as well as state statutes on appeals raised by applications for writs of habeas corpus and we respectfully submit that this Court cannot properly avoid deciding the fundamental and grave constitutional, and criminal law issues here raised.

We are now faced with the question what do the facts and the record of the Taylor case disclose? Learned counsel for the Appellee contend, seemingly, with a great gift for oversimplification and, we believe, with an able lawyer's gift for misdirection that: The constitutionality of the Dayton Housing Inspection Ordinance under the Fourteenth Amendment of the Constitution of the United States was not properly raised in the Ohio State courts, so as to confer jurisdiction upon this Court. In other words, they contend, the appellant, Taylor, and his counsel, are not properly in this Court at all.

We are well aware of the seriousness of this allegation. But from the facts and the record, unmistakably presented in this case, we can only conclude that the contention of appellee's counsel is one of scholastic casuistry worthy of the middle ages, if indeed, their contention would survive this test.

Let us look at the record. In his opening oral statement on April 8, 1957, the attorney for Earl Taylor, appellant before this Court, stated:

> "... We are here this morning on the question of the merits of the habeas corpus petition, and, of course, it is the contention of the defendant, Mr. Earl Taylor, that the affidavit filed against him does not contain facts sufficient to constitute a criminal charge and that the ordinance, so far as it permits the entry of these inspectors into the private home without a search warrant, is unconstitutional.
>
> "We are questioning by the writ of habeas corpus the reasonableness of the ordinance, constitutionality of the ordinance and whether or not the law-abiding

citizen, property owner, resident of the City of Dayton, must open doors of their home to any City inspector, with or without. We feel that the City has certainly overstepped the bounds of propriety, constitutionality, in passing this ordinance." (R. 17.)

In the cross examination of Mr. Taylor at the trial of the writ of habeas corpus the following exchange over a ruling sustaining an objection, by The Honorable Don R. Thomas, the trial judge, takes place and is recorded as follows:

"The Court: The Court on that inquiry would sustain the objection.

"Mr. Duffy: If the Court please, the man has said that he would permit the electrician, the plumber, the fireman to come in because they know what they are doing. He is objecting to the housing inspectors because they don't know what they are doing, yet he doesn't know the housing inspectors, he doesn't know their qualifications, doesn't know the training, he doesn't know the requirements to get a job with the City.

"The Court: That is true, Mr. Duffy. *However, we are in this issue concerned with a major issue, and that is as to the constitutionality of the ordinance as it applies in this particular case. I think that is possibly the chief issue we have here, and also a collateral one. I believe, that would be subject to this inquiry, and that is the charge as it applies to this gentleman.* Now his personal reasons may throw us off our course a little bit. That is the only reason I am commenting at this time. In other words, this witness may have personal reasons why he doesn't like the ordinance, which he has stated; however, those personal reasons may not affect one iota the real issue before the Court. I believe that is about as succinctly as I can state it." (R. 32.) (Italics is ours)

In the brief and reply brief filed, on behalf of Taylor, in the Court of Common Pleas the Fourteenth Amendment

to the Constitution of the United States is specifically pled. (See Appendix p. 42.)

In his written opinion, Judge Thomas, the trial Judge states:

> "The proponents of ordinances which provide for the unlimited number of inspections of private homes, at reasonable hours, contend that the execution of these ordinances does not violate the right to privacy in homes provision of the Constitution, for the reason that housing inspectors are not permitted to use force or violence in gaining admission into one's home, and the only difficulty and inconvenience that could befall one who would refuse to admit an inspector is that he merely goes to jail. Therefore, the whole arrangement is quite constitutional. This ingenious reasoning produces a distinction in methods employed, but without a difference in the end result." (R. 11)

It is true that in the trial of the case more attention is, naturally, paid to the Ohio Constitution, Statutes and Ordinances than to the Constitution of the United States, although the Fourteenth Amendment is specifically pled in the Court of Common Pleas in the brief filed on behalf of Taylor. See Appendix page 42.

The Fourteenth Amendment is also specifically pled in the Court of Common Pleas in the reply brief filed on behalf of Taylor. See Appendix page 42.

On the Appeal to the Court of Appeals, Second Appellate District of Montgomery County, Ohio the case was reported as: *State ex rel Eaton, Appellee v. Price, Chief of Police*, 105 Ohio App. 376; (R. 47-68).

By a two to one decision the judgment of the Court of Common Pleas was reversed November 2, 1957. The lengthy majority opinion rendered by Judge Wiseman with which the Presiding Judge, Hornbeck, concurs does discuss the Constitutional Issue involved in several places.

"The arrest of the relator followed. After pleading "not guilty" the relator was incarcerated in the city jail in lieu of bond. He was released from jail by the common pleas court of Montgomery County on a writ of habeas corpus. Upon hearing he was discharged from custody, on the ground that the ordinance in question was unconstitutional and void, and that therefore the municipal court of Dayton had no jurisdiction.

"Two errors are assigned: Error in passing on the constitutionality of the city ordinance in a habeas corpus proceeding; error in holding the inspection section (806-30) of the ordinance to be violative of the Fourth Amendment to the Constitution of the United States and Article 1, Section 14 of the Constitution of the State of Ohio.

"There is a diversity of opinion on the question whether the constitutionality of an ordinance may be raised in a habeas corpus proceeding. In Ohio the minority rule prevails, which is stated in Vol. 26, O. Jur. 2nd Sec. 13 page 566 as follows:

"In Ohio, it is expressly held that a writ of habeas corpus will not lie to test the constitutionality of a statute or ordinance, in favor of one who has been convicted thereunder, where the criminal court in which the conviction was obtained had jurisdiction to determine the question of constitutionality; in such case the writ of habeas corpus cannot be made the substitute for an appeal." (Cases cited)

Also, a corollary to the above rule is stated on page 567, as follows:

"Also, it has been held that the constitutionality of the statutes and ordinances may be passed upon where the petitioner is under arrest but has not been tried and convicted, and the same rule obtains where the applicant is held for appearance before the proper court upon preliminary hearing." (Cases cited)

"The relator in the instant case has not been convicted. The matter is pending in the municipal court of Dayton on his plea of "not guilty." The rule urged by appellant has no application where there has been

no conviction. This differentiation was not made in the case of *State ex rel. Focke* v. *Kirkpatrick*, 91 O. App., 131. We are required to follow the rule laid down by the Supreme Court in the cases referred to in the footnote in Vol. 26, O. Jur. 2d, pages 566, 567. The first assignment of error is not well made." (R. p. 49)

"The relator refused on several occasions to permit housing inspectors to enter his home without a search warrant, although it is not disputed that the inspectors requested access at reasonable hours. Furthermore, it is conceded that no emergency existed.

"Relator contends, and the lower court was in accord that the ordinance exceeded the police power of the city by providing for inspection of a private dwelling against the will of the occupant and without a search warrant, and that the ordinance for that reason was in violation of the constitutional provisions in the Federal and State Constitutions which prohibit unreasonable searches." (R. page 52)

The Appeals Court then mentions that the Fourth Amendment has no application to the states in the following paragraph:

"The Fourth Amendment has no application to the states.

"*State* v. *Lindway*, 131 O. St. 166, 2 N.E. (2d) 490. But the Ohio Constitution contains a similar provision."

Section 14 of Article I of the Ohio Constitution provides substantially the same. (R. page 52)

The Appeals Court then proceeds to quote with approbation Chatham's immortal statement:

"Every man's house is his castle etc.". The Appeals Court then proceeds to ably dissect various state, Federal, and United States Supreme Court cases, saying that while the Fourth Amendment is not binding upon the states, due recognition would be given to decisions of the Supreme Court of the United States interpreting the Fourth Amendment and cites and quotes:

"In the instant case, if despite the fact that the Fourth Amendment is not applicable, the tests of reasonableness which are applicable *under it should be applied under either Maryland law or the Fourteenth Amendment, a search for evidence to prove guilt of a crime would present a situation which we should regard as substantially different from that presented by an inspection for the purpose of protecting the public health or safety.* True, the privacy of the home of an individual is invaded whatever may be the reason for the search; but in one case the liberty of the individual is at stake and in the other the health and safety of the public. The latter are the objectives of the inspection in the present case." (Italics ours)

Giraud v. *State*, 124 Atl. 2d, 764, 765 (R. 59)

Thus it is clear that the Court of Appeals not only had the Fourteenth Amendment properly raised before it but also decided that the Fourteenth Amendment was not applicable to the case at bar.

In the dissenting opinion by Judge Crawford of the Court of Appeals much the same ground is covered but with a different conclusion. He quotes with approval the following:

". . . To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

District of Columbia v. *Little*, 178 Fed. 2d, 13 (17)

"There is no doctrine that search for garbage is reasonable, while search for arms, stolen goods or gambling equipment is not." Ibid, 16. (R. 64.)

After some discussion of Section 14 of Article I of the Constitution of Ohio and the Fourth Amendment to the United States Constitution Judge Crawford continues:

"There can be no serious doubt that the true purpose of these constitutional provisions was not to shield the

actual or suspected felon, but to keep inviolate the sacred right described at the beginning. "The right of the people to be secure in their persons, houses, etc." Any exception should be strictly construed. 10 O. Jur. 2d. 138, Constitutional Law, Sec. 317.

". . . to say that the specific prohibition of one threatened violation of a basic right thereby validates every other violation of that right is both illogical and unrealistic."

District of Columbia v. *Little*, 178 F. 2d, 13 (19)

"While the word "inspection" as used in the ordinance is perhaps broader and potentially more objectionable than the word "search" as found in the Constitution, we need not indulge in fine distinctions, inasmuch as interpretation should always be liberal in favor of the citizen. 10 O. Jur., 2d. 137, Constitutional Law Sec. 37.

"It is complained that the requirement of a search warrant would be inconvenient and impractical for the purposes of housing inspection. The Constitution has often been found inconvenient. But if a search warrant is the only constitutional method provided whereby the city might pursue its purpose, it must either procure one upon demand or forego the "inspection." Relator was, therefore, entirely within his rights to refuse admittance to one without a warrant.

"Lack of statutory authority for a search warrant for such an inspection certainly does not justify proceeding without one.

"It is untenable to argue that because Congress has failed to provide procedure for obtaining a search warrant, searches otherwise unconstitutional can therefore be made."

District of Columbia v. *Little*, 178 Fed. 2d 13 (20) (pp. 65, 66).

Judge Crawford does not specifically refer or rule on the Fourteenth Amendment but he does conclude: "The judgment of the trial Court should be affirmed."

The case is then appealed to the Supreme Court of Ohio, which Court affirms the decision of the Court of Appeals. (168 Ohio St. 123) (R. 73-90).

The court goes into a lengthy opinion on Ohio law, City Ordinances, the evidence, law review articles, numerous cases, the Fourth Amendment and the Constitution of the United States but we do not believe it mentions the Fourteenth Amendment of the Constitution of the United States. However, the Fourteenth Amendment to the Constitution of the United States was properly before the Supreme Court of Ohio because it was pled in the briefs of Counsel and amici curiae submitted therein and in the opinion of the Ohio Court of Appeals decision it was held that the Fourteenth Amendment did not apply. (R. 59).

The fact that the Fourteenth Amendment was properly before the Supreme Court of Ohio is not only established by the opinion of the Ohio Court of Appeals, but by the opening statement of counsel for appellant, Taylor; in the Court of Common Pleas by briefs filed therein and in the Court of Appeals.

The brief filed in behalf of Taylor in the Ohio Supreme Court and the "Brief for the Ohio Civil Liberties Union and the Dayton Chapter, Civil Liberties Union, amici curiae," filed in the Supreme Court of Ohio on May 12, 1958 both specifically plead the Fourteenth Amendment of the Constitution of the United States. For pertinent extracts from these briefs, see Appendix p. 47.

The fact that the Supreme Court of Ohio failed to rule on the applicability of Fourteenth Amendment of the Constitution of the United States does not mean it was not properly pled before that Court and was not before that Court. The Court only ignored this vital point.

There Is No Merit to the Contention That Constitutional Questions Attacking a Statute or Ordinance Cannot Properly be Raised in the Trial of an Application for a Writ of Habeas Corpus

Judge Wiseman in the opinion of the Court of Appeals correctly ruled that, even in Ohio, the question was properly raised. (R. 48, 49) We also cite the following United States Supreme Court Cases and extracts therefrom:

> "The Supreme Court has jurisdiction to review habeas corpus proceeding to obtain discharge from custody for violating an alleged unconstitutional state statute.
>
> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases are essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state Court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."
>
> "Our jurisdiction to review the decision is questioned also because of the nature of the case, it being a proceeding in habeas corpus brought to obtain the discharge of one who is held in custody to answer a charge of violating a state statute alleged to be invalid by reason of its conflict with the Constitution of the United States. But we think our jurisdiction in this regard is so well established by prior decisions and long continued practice that it is not debatable. *People of State of New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 68.

The scope of a habeas corpus proceeding brought in a state Court by one convicted in the courts of such a state is a state and not a federal question, and where the state court treated the proceeding as properly raising issues of federal constitutional rights, United States Supreme Court has jurisdiction and such issues are open here. *Herndon* v. *Lowry*, 301 U.S. 242, 257 U.S. 301; *Moore* v. *Holloban*, 294 U.S. 103, 115; *Agnello* v. *U. S.*, 269 U.S. 20, 32.

The Present Case Presents a Jusficiable "Case or Controversy" Within the Meaning of Article III Section Two of the Federal Constitution

The charges pending against the appellant, Taylor which the municipality of Dayton is pressing against him are anything but theoretical or academic. There is no situation existing in his case which is corollary to the position taken by this Court in *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, where at page 116 it was stated in pertinent part:

> "'. . . this Court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to thing in issue in the case before it, no stipulation of parties or counsel, whether in the case before the Court or in any other case, can enlarge the power or affect the duty, of the Court in this regard.'" California v. San Pablo & Tulare R. R. Co., 149 U.S. 308; United States v. Hamburg-American Line, 239 U.S. 466.[5]

In *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, this Court at page 240 stated:

> "A 'controversy' in this sense must be one that is appropriate for judicial determination . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." (Citing cases.)

The Dayton Housing Inspection Ordinance Exceeds the Police Powers Reserved to the States. Therefore, Such Ordinance Is Repugnant to the Fourteenth Amendment to the Constitution

Every promulgation of police power by the states must be measured against the test of Due Process, if found to be lacking of those rights held by this Court to be fundamental to ordered liberty, fall before the altar of justice.

[5] Cf. Doremus v. Board of Education, 332 U.S. 429 and the cases cited therein.

Jacobson v. *Massachusetts*, 197 U.S. 11, *New York ex rel. Lieberman* v. *Van DeCarr*, 199 U.S. 552.

The philosophy of the Fourth Amendment, and thus the Fourteenth Amendment, was well expressed by Mr. Justice Butler speaking for the majority in *Agnello* v. *United States*, 269 U.S. 20, 32:

> "The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws."

This Court has emphasized over and over again that a search without a warrant can be made only in exceptional circumstances. If a house is on fire or if the police see a fugitive enter a building, entry without a warrant can, of course, be made. Yet absent the extraordinary situations, the right of privacy must yield only when a judicial officer issues a warrant for a search on a showing of probable cause. *Johnson* v. *United States*, 333 U.S. 10-14; *Trupiano* v. *United States*, 334 U.S. 699; *McDonald* v. *United States*, *Id.*

4. Legislative enactments in the exercise of police power are limited by the requirements of the Due Process clause of the Fourteenth Amendment. *Whitney* v. *California*, 247 U.S. 357.

5. There is nothing in this prohibition which tends to lessen the power of the state to regulate for the public welfare, but the guarantee of Due Process demands that the law should not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained. *Nebbia* v. *New York*, 291 U.S. 502.

Whether the Case at Bar Presents a Substantial Federal Question Is Itself a Federal Question

In *Lovell* v. *Griffin*, 303 U.S. 444, this Court speaking through Mr. Chief Justice Hughes stated in pertinent part:

Said ordinance is also contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, which had the effect of making the said first Amendment applicable to the States.

. . . . We think that this question was adequately presented and was decided in the instant Case. Whether it was so presented and was decided is itself a Federal question. Carter v. Texas, 177 U.S. 442, 447; Ward v. Love County, 253 U.S. 17, 22; First National Bank v. Anderson, 269 U.S. 341, 346; Schuylkill Trust Co. v. Pennsylvania, 296 U.S. 113, 121. This Court has jurisdiction.

"It is also well settled that municipal ordinances adopted under state authority Constitute State action and are within the prohibition of the Amendment. Raymond v. Chicago Union Traction Co., 207 U.S. 20; Home Telephone and Telegraph Co. v. Los Angeles, 227 U.S. 279; Cuyahoga River Power Co. v. Akron, 240 U.S. 462. As Holmes wrote in The Common Law, "A Law which punished conduct which would not be blameworthy in the average member of the Community would be too severe for that community to bear." (Id. at 50[illegible])

The Historical Connotation of "Due Process of Law" in the Fourteenth Amendment

The words "by the law of the land," (*per legem terrae*) with which the words "due process of law" are said to be synonymous, seem to occur for the first time in the thirty-ninth chapter of King John's Charter of Liberties, where it is stated:

"No freeman shall be arrested, or detained in prison, or deprived of his household, or outlawed, or banished, or in any way molested; and we will not set forth against him, or send against him, unless by lawful judgment of his peers and by the law of the land."

Edward III substituted "by due process of law" for "by the law of the land;" in the Petition of Rights of 1629 (to Charles I) the language used was "that freemen be imprisoned or detained only by the law of the land, or by due

process of law," and not by the king's special command without any charge." 1 Stat. at Large (Eng.) 10). Essentially the purpose of the above section of Magna Charta was to substitute law for kingly force.

Concurrently with the development in England of the doctrine of due process of law there is also the doctrine that there are certain principles, either of common law or of natural law, which are paramount and superior over king and over parliament. The great champion of the supremacy of the common law was Lord Coke. The great champion of the supremacy of Natural law was the philosopher, Locke. The supremacy of the common law over the king was completely and finally established. Locke's philosophy finds expression in the Declaration of Independence. Coke's so-called *dictum* is probably the chief reason for written constitutions in the United States. With written constitutions, which are in effect statutes emanating from the sovereign people themselves, it was easy to make these constitutions supreme over legislative enactments.

Viewed in its true historical perspective, we find one of the most obnoxious things in preconstitutional times and against which James Otis delivered his most masterful address was the writ of assistance, which was a blanket permit, issued to anyone, authorizing him to prowl about at random and search any suspected place for goods on which duties had not been paid. Another was the general warrant, first used to search for stolen goods and then extended by the crown as a device for ferreting out seditious matter, under which the houses of Coke, Wilkes, and others were ransacked and papers of every description were seized, and under which messengers were directed by unrestrained roving commissions to search any place where they had reason to suspect any objectionable documents could be found, the issuance of which brought the names of Scroggs and Jefferies into such contumely and the judgment which made *Entick* v. *Carrington* a landmark, 2 Wils. 275. As

abominable as writs were, it seems appropriate to inquire if they are to become precursors of modern day counterparts which give the States and Municipalities blanket authority to enter the sanctity of the private home without the formality of a warrant supported by oath or affirmation showing probable cause. This is the purport of the Dayton Housing Inspection Ordinance.

The history of Man's fight for the sanctity of his home is fully discussed in *Frank* v. *Maryland*, *supra*, both in this Court's decision, delivered by Mr. Justice Frankfurter, and in the able dissenting opinion of Mr. Justice Douglas. These opinions go into great detail. The origin of the rights of Englishmen against unwarranted entry of their homes are lost in the mists of Anglo-Saxon tribal law, somewhat modified perhaps, in changing times by the impact of Roman, Biblical, Norman French or other customs and laws. This right of due process has been like a pillar of cloud by day and of fire by night to lead not only the British but the Americans as well, who are heirs of the Common Law of England, on the path we are now following into the history of mankind. Further comment on this point, by counsel for Taylor, we believe, will throw little if any, further light upon this Court's knowledge of the subject.

No compilation of statistics, however formidable, affords any justification for the invasion of the privacy of the home by a Housing Inspector, whatever the pretext, real or fanciful. Irrespective of the possible number of defective electrical outlets, leaky flues, clogged lines or *mal-functioning* furnaces, or whatever else, may be detected and corrected by systematic searches by Housing Inspectors, all these things to the contrary, it ill affords turning the private home into a virtual stamping ground for municipal inspectors.

Mr. Justice Holmes observed most incisively that, "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics," *Lochner* v. *New York*, 198 U.S. 45.

Where human rights are involved, as they surely are in the case at bar, such rights cannot be viewed in vacuo.

The great danger of all free peoples today is: "The Police State." We respectfully submit that such ordinances as that of Dayton, Ohio, if made the supreme law of the land, lay a firm foundation for the growth of a Police State."

Changing conditions and modern times are the great allegedly imperative reasons which are advanced in justification of such ordinances as that of the City of Dayton which allow "gentlemenly" inspectors without warrants or due process to enter citizens' homes. This is not a new thought or idea for depriving citizens of their rights. Blackstone commented:

> "It is, it must be owned, much easier to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure." Blackstone Commentaries, Book IV, Chap. 1, Caption 18.

It appears to counsel that the greatest historical example of the type of surgeon Blackstone so justly abhors is the late Adolph Hitler. (Who is alleged to have employed the "knock on the door in the middle of the night" technique quite extensively.)

See *Holden* v. *Hardy*, 169 U. S. 366, where at page 389 the Court stated:

> "this court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity to be heard in defense. . . . It is manifest that it has not left to the legislative power to enact any process which might be devised."

Again in *Bartkus* v. *Illinois*, 359 U. S. 121, this Court speaking through Mr. Justice Frankfurter stated:

> "Time and again this Court has attempted by general phrases not to define but to indicate the purport of due process and to adumbrate the continuing adjudicatory process in its application."[6]

In contrast, Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319, in discussing the rights of the people under the First Amendment has especially commended itself, he stated:

> "In these and other situations immunities that are valid as against the federal government by force of specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."

The Expanding Constitution

In recent years, we have heard a great deal of talk about the doctrine of: "The Expanding Constitution." Many critics talk and write as if this doctrine is entirely de novo and something either necessary to meet modern conditions, and therefore highly commendable or on the other hand as a new fangled notion that robs the states, the Nation and the citizens of fundamental rights, and dislocates our form of government and these citizens see in this doctrine something to be viewed with alarm, concern and dismay.

The appellant, Taylor, and his counsel have no quarrel with the doctrine of: "The Expanding Constitution", to us it appears merely a modern version of the struggle over whether or not the Constitution is to be loosely or strictly construed, which struggle has existed almost since the

[6] More adumbration, as contradistinguished from positive requirement, seems most difficult to reconcile with the doctrine of federal supremacy announced in Clause Two of Article Six of the Constitution.

adoption of the Constitution in 1787. As long as construction of the Constitution is grammatically, logically and reasonably drawn from the text of that great document we have no reason to quarrel with either the classical doctrines of: "Strict Construction," "Loose Construction" or the allegedly new doctrine of: "An Expanding Constitution."

To us the Constitution is written in intelligible English in words generally known and understood as well today as when first written and which words are usually simple, unequivocal and of Anglo-Saxon origin. In general the Constitution says what it means and means what it says, which is the same as when the document and the Amendments thereto were adopted.

We do, however, have a righteous quarrel with the city fathers of Dayton, Ohio, who in the name of progress and modern necessity have proceeded to so regulate and legislate by ordinance that, with all seriousness and respect, we submit if said ordinance is sustained by the Supreme Court of the United States of America and becomes the law of the land that a firm foundation upon which a future police state may be erected has been legally laid; and the city fathers of Dayton have in truth, fact and deed revised the Constitution of the United States.

Mr. Justice Brandeis Foresaw the Evils of the Police State and Observed

"You can't solve the problems of today by creating tyranny for tomorrow."

The great danger to all free peoples today is the threat of the Police State. From little seeds mighty and terrible wildernesses of tyranny can grow. The history of our own times is too replete with horrible examples well known to all free men, to necessitate the calling to the minds of this Court of the origin, growth, and methods of modern despotisms. In typical communist infiltration of a free nation the first step is to secure control of the police and the

ities which regulate the daily lives of the citizens. After this control has been secured the treasury, the armed forces, and the educational system fall into line. The control of the armed military forces is secondary to that of the police for soldiers obey orders and officers can either come over and be absorbed in the new reform system or be eliminated. Conservative moneyed interests usually fall in line behind those in power and educators, for the most part, merely change the point of view with which they teach history and economics.

The rise of Hitlerian Germany followed the same pattern. The Weimar Constitution of 1928, under which Hitler rose to power, carefully protected the rights of individuals. When Hitler's courts, judges, lawyers, police, bureaucrats and regulators got through where were the rights of individuals?

Recent history reminds us of an observation made by Thomas Jefferson: "Liberty is a delicate flower."

Blackstone's Commentaries (which in the last of the eighteenth and most of the nineteenth century were in the saddlebags of most circuit-riding lawyers together with state statutes, ink, pens and legal cap paper, of all states except Louisiana, where the Civil Code and Code of Practice replaced Blackstone) has much to say about the rights of Englishmen. Let us quote from this learned jurist, who through his writings wielded such tremendous influence, yet, who created nothing new but merely commented on rights of Englishmen which had existed, in some instances, from the first recorded efforts of Anglo-Saxon writers to secure the liberties of their people.

> "Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law." [Cap 139]
>
> "The third absolute right, inherent in every Englishman, is that of property: which consists in the

free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land". [Cap 138]

"For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institutions of friendly and social communities. Hence it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals." [Cap 125]

"Next to personal security the law of England regards, asserts, and preserves the personal liberty of individuals." [Cap 135]

Blackstone's Commentaries Book I,
Chapter I, The Rights of Persons.

It may be felt, by some, that we are viewing with too great alarm this little routine police court and regulatory action under a city ordinance in Dayton, Ohio. Solomon in his great wisdom said, " . . . the little foxes that spoil the vines; for our vines have tender grapes." (Songs of Solomon, 2:15.) Let us consider that the tyrannies of Sparta, Syracuse and Venice were enormities. They were sometimes more escapable but were as complete as some national or international tyrannies of today.

We are told in brief that there are many kinds of inspectors in Dayton. Why should all not be given identification cards and allowed to inspect homes at any reasonable hour? If this is legal? Why not give party leaders and block party leaders this right? This decision, if it stands, permits these future enormities to be sanctified by law. Should this happen, where are our rights? Have we exaggerated? We think not.

Let us contemplate the electric lines written, it is said by Thomas Paine on a drum head by a camp fire on the banks of the Delaware and read to Washington's troops

before they crossed on Christmas Eve 1776 to attack the Hessians. "Tyranny, like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph." The Crisis No. 1.

We feel, at least, that Mr. Chief Justice Warren has disclosed a cognizance of this problem. In a speech on February 19, 1955 at Washington University he said in part:

> "The fact remains, however, that we do have a battle today to keep our freedoms from eroding, just as Americans in every past age were obliged to struggle for theirs. Many thoughtful people are of the opinion, that the danger of erosion is greater than that of direct attack." * * *
>
> "The liberties thus written into our fundamental law have not gone unassailed in the course of our national history, for men in office are still men. Whether men derive their authority from hereditary right or from popular election, they remain prone to overstep constitutional limitations and invade legal immunities."

Not De Minimus But De Maximus

It has been emphasized below: That many municipalities have adopted such ordinances and very little trouble has arisen. That the mass of the citizens accept such practices as those of Dayton. That we after all, must meet the conditions of modern urban life. That a few eccentries must be regimented into surrendering such little rights as that of protecting their homes from the entry by strangers, without due process of law or without very grave emergency, so that these strangers may inspect the premises for no known, avowed or discernable purpose.

To all such sophisticated reasoning counsel for Taylor can only exclaim: How horrible! How revolting! To what degradation have we once-free people and our hard-won liberties sunk!

The great tradition is that even Taylor's humble cottage is his castle. The home of an humble citizen is sanctuary,

inviolable, except by due process of law, or in grave emergency, which admittedly does not exist in the present case. This is only a little right,[1] yet even so there are those who love this little right and the pages of history are full of the great, the little known and the unknown who died defending this right.

Where such constitutional rights are involved the de minimus rule is never applicable. Such constitutional rights, as Taylor lawfully claimed and exercised, are always de maximus.

CONCLUSION

We therefore conclude that the judgment of the Ohio State Supreme Court, affirming the judgment of the Court of Appeals of Montgomery County, Ohio should be reversed and the opinion of the Common Pleas Court of Montgomery County, Ohio declaring the Ordinance of the City of Dayton, Ohio unconstitutional be approved and the appellant Earl Taylor be discharged for the following reasons:

1. The present case is not controlled by the authority of *Frank v. Maryland, supra*, because:

A. The Baltimore, Maryland, City ordinance involved in the Frank case required that: "Whenever the Commissioner of Health *shall have cause to suspect* that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the daytime."

The Dayton, Ohio, City ordinance affects housing inspectors *and has no provision requiring that the housing inspector shall have reasonable cause to suspect anything* demand *entry into a* home except that the inspector show appropriate identification and at any reasonable hour, whatever those terms mean.

---

[1] Lex non curat de minimus. (The law does not pay attention to trifles.) Human rights are never mere trifles.

It is conceeded that Taylor's home is in first class condition in every particular while there is apparent cause to suspect rodents in Frank's home because the Health officer had reports of rodents in the Frank case and from the outside signs it appeared probable without even entering Frank's premises or home that rodents were present. The Health inspector might be said to be in hot pursuit of rodents which endangered the public health and safety.

It is not only admitted that Taylor's house was first class in every particular but none of the housing inspectors could or did ever give any valid reason for their purpose in wanting to enter his home and carry out their inspection, examination and survey except that the law (city ordinance) authorized them to do so without the necessity of securing a warrant.

B. The Baltimore ordinance is a civil proceeding with a civil penalty. Frank could not have been committed to jail for his refusal to let a health inspector inspect his premises.

The Dayton, Ohio, ordinance is a criminal one and carries with it a criminal penalty. Taylor the appellant herein was arrested and was thrown into jail, with scant consideration, and kept there in lieu of failing to post a $1000.00 bond.

The differences between the facts in *Frank* v. *Maryland* and the case at bar wherein Taylor is appellant are so great that they are hardly relevant at all and obviously this case cannot be controlled by the decision in *Frank* v. *Maryland*.

2. A "justiciable case or controversy" exists and a substantial Federal question is adequately presented in the Ohio State Courts below. All decisions mentioned the constitutionality of the Dayton Ordinance, the trial court, the Court of Common Pleas held the ordinance violated the Constitution of the United States. The other Courts held the Constitution of the United States was not violated. The

Court of Appeals of Montgomery County, Ohio, specifically held that the Fourteenth Amendment to the Constitution of the United States was not violated by the Dayton, Ohio Ordinance. The Constitutional question was referred to by the trial judge in the Court of Common pleas in the evidence while sustaining a motion by appellant Taylor's Counsel while Taylor was under cross examination on the trial of the application for a writ of habeas corpus. In the opening oral statement before the Court of Common Pleas Counsel for Taylor, appellant specifically alleges the Dayton Ordinance to be violative of the Constitution of the United States. In every brief filed in the Ohio Courts below it was specifically pled that the Dayton ordinance violated the Constitution of the United States and specifically pled that the Ordinance violated the Fourteenth Amendment to the Constitution of the United States. The facts of the case clearly show a violation of the Constitution of the United States and of the Fourteenth Amendment to the Constitution of the United States and the due process clause thereof at every stage of the proceedings when reasonably possible to do so hence a justiciable controversy exists and was adequately presented so as to give the Court jurisdiction.

3. A constitutional question attacking a statute can be raised in the trial of an application for a writ of habeas corpus.

4. The term "Due process of law" in the Fourteenth Amendment to the Constitution of the United States demands that the Dayton Ordinance be declared unconstitutional and being properly raised this must be done.

WHEREFORE, the appellant Earl Taylor prays that the decision of the Supreme Court of Ohio, affirming the decision of the Court of Appeals of Montgomery County, Ohio be reversed. That the Dayton City Ordinance No. 8[illegible] Sec. 806-30 and 806-8[illegible] of the Ordinances of the City of Dayton, Ohio passed by the Commission, of said City

November 10, 1954, be declared unconstitutional and in violation of the Constitution of the United States and of the Fourteenth Amendment and the Due Process Clause and the Equal Protection Clause thereof. That the Appellant herein, Earl Taylor be ordered discharged.

Respectfully submitted,

ELBERT E. BLAKELY
GREENE CHANDLER FURMAN
Attorneys for Appellant

APPENDIX

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

Case No. 111465

ARTHUR T. EATON, EX REL. EARL TAYLOR, *Plaintiff*

v.

CITY OF DAYTON, *Defendant*

Brief of Respondent (Excerpts)

* * * * * * * *

In conclusion, we wish to cite the Court to Wolf v Colorado, 338 U.S. 25, which reads as follows:

> "Arbitrary intrusion into privacy by the police is prohibited by the Due Process Clause of the Fourteenth Amendment.
>
> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-Speaking peoples. According, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

Respondent contends that the ordinance is unconstitutional at least insofar as it authorizes the violation of the respondent's constitutional rights; that the ordinance has certainly over-stepped bounds of reasonableness and the police powers of the City of Dayton; that it must yield to the constitutions and to the general laws, and that

searches shall not be permitted unless city inspectors comply with the law requiring search warrants; that the writ of habeas corpus should be sustained and the respondent discharged.

* * * * * * * * * * *

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

Case No. 111465

ARTHUR T. EATON, EX REL. EARL TAYLOR, *Plaintiff*

v.

CITY OF DAYTON, *Defendant*

Reply Brief of Respondent (Excerpts)

* * * * * * * * * * *

In addition to a violation of the "search and seizure" provisions of the Constitutions, it is the contention of the respondent that the acts taken and threatened violate the "due process" and "equal protection" clauses of the Constitutions. See Conner v. Board of Commissioners, Logan County, 12 Federal, 2nd Edition 789.

* * * * * * * * * * *

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

Case No. 2439 C.A.

STATE OF OHIO, EX REL. ARTHUR T. EATON, *Relator-Appellee*

v.

PAUL J. PRICE, ETC., *Respondent-Appellant*

Brief of Realtor-Appellee (Excerpts)

* * * * * * * * * * *

This ordinance apparently attempts to give the Housing Inspectors greater authority than police officers who must obtain a search warrant before entering a private dwelling. There are now approximately twenty-five different kinds of inspectors working for the City of Dayton, Ohio, and it is obvious, if the Court refuses to grant the writ of

habeas corpus in this case, the citizens of the City of Dayton will be required to throw open their doors to all. This certainly is not in accordance with the clear language, intent and spirit of the constitution nor with any laws or existing precedents.

Also we wish to cite the Court to Wolff v. Colorado, 338 U.S. 25, which reads as follows:

> "Arbitrary intrusion into privacy by the police is prohibited by the Due Process Clause of the Fourteenth Amendment."

* * * * * * * * * *

SUPREME COURT OF OHIO

No. 35488

THE STATE OF OHIO, EX REL. ARTHUR T. EATON,
Relator-Appellant

v.

PAUL J. PRICE, Chief of Police, City of Dayton,
Respondent-Appellee

Appellant's Brief (Excerpts)

ASSIGNMENT OF ERRORS

Appellant, for his assignment of errors, says there is error prejudicial to his rights in the several proceedings and judgment of the Court of Appeals of Montgomery County, rendered against him, on the thirteenth day of December 1957, in the following respects:

FIRST. Said Court erred in holding that Section 806-30 of The Housing Code of the City of Dayton, Ohio, contained in Ordinance #18099 is valid and within the police power of the City of Dayton, Ohio.

SECOND. Said court erred in holding that said Section 806-30 of said ordinance is not violative of the Constitution of the United States.

Third. Said court erred in holding that said Section 3630 of the said ordinance is not violative of the Constitution of the State of Ohio.

Fourth. Said court erred in holding that Realtor was not deprived of his constitutional rights of law and of his right to be secure, and of his right of privacy.

Fifth. Said court erred in reversing the judgment of the Common Pleas Court of Montgomery County, Ohio.

Sixth. Said court erred in granting final judgment for Respondent and against Relator on relator's application for Writ of Habeas Corpus.

. . . . . .

Article IV of the Amendment of the United States Constitution reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon porbable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Section 14, of the Ohio Constitution reads as follows:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

The Court is also respectfully referred to the case of Ohio v. Lindway, 131 O. S. Page 166 which holds as follows:

"An officer of the law who makes search and seizure in a dwelling or other premises, without a warrant or with an illegal warrant . . . is a trespasser, and amenable to an action for such trespass."

See also Bott v. Cincinnati, 43 O. App. Page 257 where it was held:

> "No General exploratory search and seizure of either persons, houses, or effects can ever be justified, either with or without warrant."

See also United States v. Rembert, 284 Federal 9 which holds that

> "No general exporatory search and seizure of either persons, houses, or effects can ever be justified, either with or without warrant."

. . . . . .

We respectfully cite the Court to the case of Johnson v. United States, 333 U.S. 10, wherein it is held as follows:

> In this case entry "was granted in submission to authority rather than as an understanding and intentional vaiver of a constitutional right."
>
> "Any assumption that evidence sufficient to support a magistrates' distinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's houses secure only in the discretion of police officers."
>
> "The right of officers to thrust themselves into a home is also a grave concerne, not only to the individual but to a society and to one which chooses to dwell in reasonable security and freedom from surveillance."
>
> "The Officer gaining access to private living quarters under color of his office and of the law which he personifies must have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their person, houses, papers and effects,' and would obliterate one of the most fandamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

. . . . . .

Also we wish to cite the Court to *Wolff* v. *Colorado*, 338 U. S. 25, which reads as follows:

"Arbitrary intrusion into privacy by the police is prohibited by the Due Process Clause of the Fourteenth Amendment."

"The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is, therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned, as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. According, we have no hesitation in saying that were a State affirmatively to sanction such policy incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

* * * * * * * * * *

IN THE SUPREME COURT OF OHIO

No. 35,488

STATE OF OHIO, EX REL. ARTHUR T. EATON,
Relator-Appellant

v.

PAUL J. PRICE, *Respondent-Appellee*

Appeal from the Court of Appeals, Montgomery County

Brief for the Ohio Civil Liberties Union and the Dayton Civil Liberties Union, Amici Curiae (Excerpt)

* * * * * * * * * *

III. THE DAYTON ORDINANCE ALSO CONFLICTS WITH THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Up to this point, we have only been considering the Ohio constitutional provision. This ordinance also, however, conflicts with the Federal Constitution. For while it is true that the Fourth Amendment to the United States

Constitution is not directly applicable to the States, *State* v. *Lindway*, *supra*, the Fourteenth Amendment to that Constitution does preserve the right of citizens, as against the States, to be free from unrestricted search without warrant. This is made perfectly clear in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), where the United States Supreme Court stated, in so many words, that a state could not, consistent with the Fourteenth Amendment, affirmatively sanction indiscriminate search without warrant.

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FILED
MAR 11 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 30

OHIO EX REL. EATON,

Appellant,

v.

PRICE, CHIEF OF POLICE,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 30

OHIO EX REL. EATON,

Appellant,

v.

PRICE, CHIEF OF POLICE,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

SUPPLEMENTARY BRIEF FOR THE APPELLEE

Preliminary Statement

On November 7, 1959, Appellant filed his Brief in this case. On December 7, 1959, Appellee filed his Brief in Answer to the Brief of Appellant. On February 10, 1960, Appellant with permission of the Court filed a Substitute Brief. This Substitute Brief reiterated in effect what Appellant had said in his original Brief but in addition presented new matter and new arguments not presented in

the original Brief. The filing of Appellant's Substitute Brief has necessitated this Supplementary Brief on behalf of Appellee. This Supplementary Brief is not intended by Appellee to replace his principal Brief but is intended merely to supplement it by answering new matter and new arguments raised by Appellant in his Substitute Brief. All statements of fact and arguments of law in Appellee's principal Brief are hereby expressly reaffirmed and will not be repeated herein.

ADDITIONAL ARGUMENT

I. The Validity of the Dayton Housing Inspection Ordinance under the Due Process of Law Clause of the Fourteenth Amendment Was Not Raised in the State Courts so as To Confer upon This Court Jurisdiction To Decide an Appeal under That Amendment.

Appellant has contended in his Substitute Brief that the due process of law question under the Fourteenth Amendment was raised in briefs to the state courts and is therefore properly before this Court. On February 10, 1969, he deposited copies of the lower court briefs in the office of the Clerk of this Court and he has printed extracts from those briefs in an Appendix to his Substitute Brief.

These briefs were not filed by Appellant as part of the Record within the time limit set by Rule 13(1) of this Court nor were they designated by Appellant as one of the "parts of the record the printing of which he thinks necessary for a consideration of the questions presented" within the time limit set by Rule 17(1). They are therefore not properly before this Court. Even if Appellant had complied with the Rules, however, these documents would not properly be before this Court because the Court has repeatedly held that briefs in the lower courts are not

part of the record and will not be considered by it in determining whether or not a federal question was raised. *E.g.*, see *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54; *Live Oak W. U. Ass'n* v. *Railroad Comm'n*, 269 U.S. 354, 358-59; *Harding* v. *Illinois*, 196 U.S. 78, 84.

Even if the briefs in the state courts were a part of the record in this Court, an examination of the briefs relied upon by Appellant in this case would serve only to strengthen Appellee's argument that the due process of law question under the Fourteenth Amendment to the United States Constitution was never raised in the courts below. Appellant quotes on pages 42-43 of his Substitute Brief from the Brief submitted by him to the state trial court. The quoted excerpt does not contain a specific allegation that the Dayton ordinance is unconstitutional under the Fourteenth Amendment, although it does recite language from *Wolf v. Colorado*, 338 U.S. 25, which mentions the Fourteenth Amendment. This quote from another case is the only reference to the Fourteenth Amendment in Appellant's entire Brief. That he did not intend in this casual way to present the federal due process question for the decision of the trial court is made very clear by his framing of the legal question involved on the first page of the same Brief. Immediately after the statement of facts the Brief says:

> "The legal question involved here is whether or not the City Inspectors have a right to invade the privacy of a private residence, at will, under the City Ordinance passed by the City Commissioners on November 25, 1954, or whether the respondent may rely on his constitutional rights protecting him from unreasonable searches and seizures *as contained in Article IV of the Amendments to the Constitution of the United*

States as passed by our forefathers on June 15, 1790." (Emphasis added.)

Acting upon the federal question thus framed by Appellant in his principal brief, the trial court could reasonably have been expected to rest its decision, as it did, entirely upon the Fourth Amendment. This could be expected despite Appellant's general reference to "the 'due process' and 'equal protection' clauses of the Constitutions" in his Reply Brief, quoted on page 43 of his Substitute Brief to this Court. As to the sufficiency of such vague language to raise a federal question, see *Bowe* v. *Scott*, 233 U.S. 658, 664-65; *Harding* v. *Illinois*, 196 U.S. 78, 88. The purpose of a reply brief is to answer new matter raised by one's adversary in his brief, not to raise for the first time constitutional contentions which he will have no opportunity to answer since he has already filed his brief. The entry of judgment by the trial court showed that it did not consider or pass upon the question of deprivation of property without due process of law within the meaning of the Fourteenth Amendment to the United States Constitution (R. 13). Moreover, there is nothing in the Record or in other documents deposited by Appellant in the office of the Clerk of this Court to indicate that the Reply Brief in the trial court was transmitted to either of the two Ohio appellate courts or considered by them in rendering their decisions, which also failed to consider or pass on the federal due process question.

A consideration of the complete briefs filed with the two Ohio appellate courts shows conclusively that the federal due process question was not raised by Appellant in those courts. It is Ohio practice to include an "Assignment of Errors" at the beginning of each brief. *Ohio Sup. Ct. R. Prac.* 2, § 2(A); *Ohio Cts. App. R. Prac.* VII. The Assign-

ment of Errors filed in the Ohio Court of Appeals by Appellee (appellant in that court) read as follows:

> "1. Error in passing on the constitutionality of a City ordinance in a habeas corpus proceeding.
> "2. Error in holding the inspection section (806-30) of the ordinance to be violative *of the Fourth Amendment of the Constitution of the United States and Article I, Section 14 of the Ohio Constitution.*" (Emphasis added.)

No reference was made to due process of law or the Fourteenth Amendment, and the court did not have that question before it. On page 44 of his Substitute Brief to this Court Appellant has pointed to a single sentence quoted from *Wolf* v. *Colorado*, 338 U.S. 25, in his Brief to the Ohio Court of Appeals, in which quote the due process clause was mentioned. But that quote appears in Appellant's Brief to the Court of Appeals beneath the following heading:

> "II. Error in holding the inspection section (806-30) of the ordinance to be violative *of the Fourth Amendment of the Constitution of the United States and Article I, Section 14 of the Ohio Constitution.*" (Emphasis added.)

Under the same heading, Appellant attempted to distinguish *Givner* v. *State*, 210 Md. 484, 124 A.2d 764 (1956), which Appellee had cited in his Brief, by arguing that the *Givner* case was decided under the Fourteenth Amendment:

> "The Court helded (sic) 'that the inspection herein involved are (sic) not unlawful as violative of the Fourteenth Amendment', so that case was decided on different constitutional provisions than we have in Ohio and a question of whether or not the Fourteenth

Amendment to the United States Constitution applied in that particular case."

See Appellant's Brief as appellee in the Court of Appeals of Montgomery County, Ohio, p. 13.

On appeal to the Supreme Court of Ohio, Appellant included in his Brief the Assignment of Errors which he quotes on pages 44-45 of his Substitute Brief to this Court. Nowhere in that Assignment of Errors did he mention due process of law or the Fourteenth Amendment to the United States Constitution. On page 36 of his Brief he repeated the attempt made in his Brief to the Court of Appeals to distinguish *Givner* v. *State* on the ground that it was decided under the Fourteenth amendment.

The fact that the Ohio and Dayton Civil Liberties Unions argued violation of the Fourteenth Amendment in their Amicus Curiae Brief to the Ohio Supreme Court is, of course, insufficient to give this Court jurisdiction where that question was not raised by the parties. Even if Courts could properly consider constitutional questions raised only by an amicus curiae, the Ohio Supreme Court could not do so in this case because the question was not raised and decided in the lower courts. See authorities cited on page 10 of Appellee's principal Brief.

Appellee has cited and quoted the briefs in the Ohio courts in order to answer the argument made by Appellant in his Substitute Brief that those briefs raised the due process of law question under the Fourteenth Amendment. By reference to those briefs Appellee has shown that they did not raise the due process question. Regardless of the fact that the briefs support his position on the jurisdictional question, it is Appellee's primary contention that they are not properly a part of the Record in this case and

that the fact that the due process question was not raised on the Record is itself sufficient to exclude that question from the consideration of this Court.

Appellant has argued in his Substitute Brief not only that the federal due process question was raised in his briefs to the Ohio courts but that it was expressly passed upon by the courts. However, the only instance he cites in which any of the opinions of the three Ohio courts even used the words "Fourteenth Amendment" is on page 23 of his Substitute Brief where he quotes a portion of *Givner* v. *State*, 210 Md. 484, 504, 124 A. 2d 764, 775 (1956), which refers to the Fourteenth Amendment and which was quoted by the Ohio Court of Appeals in its opinion (R. 59). Based upon this single reference to the Fourteenth Amendment in a case quoted in the court's opinion, Appellant concludes that the court "specifically held that the Fourteenth Amendment to the Constitution of the United States did not apply to this case" (Substitute Brief, p. 10).

What the court did hold can easily be determined by reference to the entire opinion (R. 47-64). After stating the facts, the court said:

> "Two errors are assigned: Error in passing on the constitutionality of the city ordinance in a habeas corpus proceeding; error in holding the inspection section (806.30) of the ordinance to be violative of the Fourth Amendment to the Constitution of the United States, and Article I, Section 14 of the Constitution of the State of Ohio" (R. 48).

It then briefly disposed of the first assigned error, and at the bottom of page 49 (as its opinion is printed in the Record) reached the question of whether the ordinance is constitutional. After citing the applicable statutory pro-

visions (R. 50-52), it quoted the Fourth Amendment to the United States Constitution and stated:

> "The Fourth Amendment has no application to the states. State v. Lindway, 131 O. St., 166, 2 N.E. (2d) 490. But the Ohio Constitution contains a similar provision" (R. 52).

The Court then proceeded to quote Article I, Section 14 of the Ohio Consitution, and the rest of the opinion (R. 53-64) discussed the constitutionality of the housing inspection ordinance under that section of the Ohio Constitution. It is in the course of this discussion that the quote from *Givner* v. *State* with its reference to the Fourteenth Amendment occurred. The discussion concluded with the statement:

> "The inspection contemplated by the ordinance is not an 'unreasonable search' within the meaning of the provision prohibiting 'unreasonable searches and seizures' in Section 14 of Article I of the Ohio Constitution" (R. 64).

From the foregoing it is perfectly plain that the due process question under the Fourteenth Amendment was never passed on by the Ohio Court of Appeals as Appellant contends. Appellant's contention that the other Ohio courts passed on the due process question has as little basis in fact as his contention with regard to the Court of Appeals. He does not even cite instances in which those courts quoted cases which mentioned the Fourteenth Amendment, as he does for the Court of Appeals. The fact is, as shown by Appellee in his principal Brief (pp. 5-7, 9), all three state courts rested their decisions expressly and exclusively upon the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

II. The Validity of the Dayton Housing Inspection Ordinance under the Equal Protection Clause of the Fourteenth Amendment Was Neither Raised in the State Courts nor Set Forth as a Question Presented in the Notice of Appeal.

Appellant has listed as one of the Questions Presented on page 4 of his Substitute Brief the issue of whether he has been deprived of equal protection of the laws as guaranteed by the Fourteenth Amendment. None of the opinions or judgments of the state courts passed on this question or even mentioned "equal protection" (R. 4-14; 47-69; 73-90). Nowhere in the Record does any such contention appear to have been made by Appellant in the state courts. The only place Appellant mentioned equal protection in the state courts was in the sentence in his Reply Brief to the trial court which is quoted on page 43 of his Substitute Brief to this Court. The effect of that quote has already been discussed on page 4 of this Supplementary Brief in considering the question of whether it sufficiently raised the question of due process.

Furthermore, Appellant omitted any reference to equal protection of the laws in setting forth the questions presented by this appeal in his Notice of Appeal filed with the Supreme Court of Ohio (R. 94-96). Rule 10(2) of this Court provides:

> "Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court."

Nowhere in his Brief for Substitute Brief has Appellant attempted to show in what way the Dayton ordinance denies him equal protection. Even if the equal protection question were properly before this Court, the inspection ordinance

by its terms manifestly applies to all persons equally. Appellant has recognized as much in his Substitute Brief in which he says on page 4, the same page on which he raises the equal protection question:

> "Under the Dayton Housing Inspection Ordinance the Housing Inspector is authorized to enter *all* private dwellings and premises."

III. The Ordinance Involved in This Case Is Not Distinguishable from the Ordinance Involved in Frank v. Maryland on the Ground that This Ordinance Is Criminal and the Ordinance in the Frank Case was Civil.

Appellant in his Substitute Brief proposes two distinctions between this case and *Frank* v. *Maryland*, 359 U.S. 360. The first distinction, based on cause to suspect, is proposed by Appellant on pp. 11-15 of his Substitute Brief and is fully answered by Appellee on pp. 20-23 of his principal Brief. The second distinction is proposed by Appellant on pp. 15-17 of his Substitute Brief, wherein he states:

> "The Baltimore Ordinance Carries a Civil Penalty and Is Civil. The Dayton Ordinance Carries a Criminal Penalty and Is Criminal."

This distinction was not proposed by Appellant in his original Brief, and hence will have to be answered in this Supplementary Brief. Appellant's contention, evidently is that because the ordinance in the *Frank* case imposed a fine rather than a term of imprisonment for refusal of entry to an inspector, the offense was "civil" and therefore different from the offense prescribed by the ordinance in this case which is "criminal". He bases his contention as to the civil nature of the offense under the Baltimore ordinance upon the use of the word "forfeit" in that ordinance. Substitute Brief, p. 16.

The attempted distinction disregards the fact that *Frank v. Maryland* was in this Court on appeal from the *Criminal* Court of Baltimore. It disregards the language of this Court in its opinion in the *Frank* case wherein it stated that the Baltimore inspector "*swore out a warrant for appellant's arrest*," 359 U.S. 361, that appellant "was found *guilty of the offense* alleged in the warrant," *Id.* at 362, and that the "Health Commissioner of Baltimore estimates the number of *prosecutions* under § 120 average one per year" *Id.* at 372, n. 16. (Emphasis added.) It further disregards a relevant provision of the Maryland Code which states, under the heading "Fines and Forfeitures:"

> "When any fine or penalty is imposed by any act of Assembly of this State or by any ordinance of any incorporated city or town in this State enacted in pursuance of sufficient authority, for the doing of any act forbidden to be done by such act of Assembly or ordinance, or for omitting to do any act required to be done by such act of Assembly or ordinance, the doing of such act or the omission to do such act shall be deemed to be *a criminal offense*. . . ."
>
> 4 ANN. CODE MD. art. 38, § 1 (1957) (Emphasis added.)

Clearly the ordinance which this Court upheld in the *Frank* case was a criminal ordinance and imposed a criminal penalty the same as does the ordinance in this case. The fact that the ordinance here involved allows imposition of either a small fine or a short prison term for refusal of entry to a housing inspector whereas the ordinance in the *Frank* case allowed only a fine for such refusal would be a possible distinction only if the question before this Court were whether the penalty "is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis I.M. & S. Ry.* v. *Williams*, 251 U.S.

63; 66-67. No such question was argued or passed upon in the lower courts, nor has it been noted as one of the questions presented by this appeal (R. 95-96). The question presented to the Court in this case, like the question presented to it in the *Frank* case, is the constitutionality of the offense and not the constitutionality of the penalty.

Appellant's filing of a petition for writ of habeas corpus while he was awaiting trial in the Dayton Municipal Court interrupted proceedings in his prosecution for violation of the city inspection ordinance. His imprisonment, in lieu of $1,000 bond, was to secure his presence at trial and was not punishment for violation of the inspection ordinance since there was never any trial or sentence on the merits of the charge. The constitutionality of the penalty under the Dayton inspection ordinance could not possibly be before this Court because no penalty was ever imposed upon Appellant. The Court has only recently reaffirmed the settled principle that it sits solely to adjudge the legal rights of litigants in actual controversies and will not declare a statute or ordinance unconstitutional because of the possibility that it might be applied unconstitutionally, where the facts of the case do not present such unconstitutional application. *United States* v. *Raines*, 28 U.S.L. Week 4147 (U.S. Feb. 29, 1960).

Moreover, even if the question before this Court were the constitutionality of the penalty permitted by the Dayton inspection ordinance, that penalty would appear to be well within the "wide latitude of discretion" enjoyed by states and their subdivisions in prescribing punishment for the violation of their laws. *St. Louis I. M. & S. Ry.* v. *Williams*, 251 U.S. 63, 66.

Conclusion

For the reasons stated by Appellee in his principal Brief and in this Supplementary Brief, this appeal should be dismissed for want of a properly presented substantial federal question; or, alternatively, the decision of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 30

OHIO, EX REL. EATON, *Appellant*,

v.

PRICE, Chief of Police, *Appellee*.

On Appeal From the Supreme Court of Ohio

REPLY BRIEF FOR APPELLANT

WHY A SUBSTITUTE BRIEF IS NECESSARY

The imperative need for filing a substitute brief was recognized because of the illness and death of the third attorney for appellant on January 2, 1960, and the confusion resulting therefrom. The new material presented in the substitute brief, in opinion of present counsel, is properly before the Court and is of such vital import as to be relevant, material, and indispensable to consideration of all phases of the federal question presented by case at bar.

PURPOSE OF APPELLANT'S REPLY BRIEF

Appellant finds it necessary to file a reply brief for the reasons set forth as follows:

a. That appellee contends under I, in his additional argument that the Due Process of Law Clause of the Fourteenth Amendment was not raised in the Ohio Courts in such a manner as to confer jurisdiction on this Court. Hence, if this contention is true, no federal question exists. *This contention of appellee is untenable, because it is contrary to the facts, as will be shown in succeeding sub-paragraphs.*

b. That appellee also contends in his supplementary brief under II, in his additional argument, as follows:

> "The validity of the Dayton Housing Inspection Ordinance under the 'Equal Protection' Clause of the Fourteenth Amendment was neither raised in the State courts nor set forth as a question presented in the Notice of Appeal."

Likewise, this contention of appellee is untenable because it is not in accord with the facts.

c. That, whereas, in fact, the record discloses: In the Notices of Appeal to the Supreme Court of the United States, filed in the Supreme Court of Ohio January 2 and 6, 1959, and in the Common Pleas Court, Montgomery County, Ohio, January 5, 1959, the violation of the Fourteenth Amendment was specifically raised in *seven different places* (R. 91, 92, 93, 94, 95, 96(2)). A more detailed reference to the instances where the violation of the Fourteenth Amendment was raised follows in sub-paragraph

[1] Among other things, the reply brief of respondent in the Common Pleas Court of Montgomery County, Ohio, states: "In addition to a violation of the 'search and seizure' provisions of the Constitutions, it is the contention of the respondent that the acts taken and threatened violate the '*due process*' and '*equal protection*' clauses of the Constitutions . . ."

d. In the Notice of Appeal to the Supreme Court of the United States filed in the Supreme Court of Ohio January 2, 1959, it is stated in pertinent part, as follows:

> "Said appeal is taken pursuant to 28 U. S. C. 1257-2 and involves a constitutional question in connection with the fourth and *fourteenth amendments of the Constitution of the United States.*" (R. 91)

In Notice of Appeal to the Supreme Court of the United States filed in the Common Pleas Court of Montgomery County, Ohio, January 5, 1959, it is stated:

> "The Appellant Earl Taylor claimed that the housing and health ordinance was unconstitutional and that the proposed inspection constituted an unreasonable and illegal search of his home, a wrongful trespass upon his property and a wrongful taking thereof *without due process of law*,[2] all in violation of his constitutional rights under the fourth and *fourteenth amendments of the Constitution of the United States.*" (R. 92)

And again in same Notice of Appeal it is stated:

> "No. 2. . . . Appellant claiming that said section of the ordinance was repugnant to the fourth and *fourteenth amendments of the Constitution of the United States*. . . ."

[2] See Zylstra v. City of Charleston, 1 Bay 382, 1794, which holds that a municipal ordinance which violates due process of law is a nullity. Thus, it will be seen, the adoption of the Due Process Clause in 1868, simply proclaimed what had already been the law from earliest times. The comments of the Court on the corruptive tendency of power seem particularly appropriates to the case at bar. "[T]. . . Upon the slender basis for the confined authority which the corporation really possesses, *to erect such a high superstructure, and insist publicly on their right to do so, proves another thing. It serves to illustrate upon a small scale, the intruding, usurping nature of power; and with how much greater than the energy of a wedge, is eternally at work to force open for itself, more elbow-room and free license, than the foresight itself or reason ever intended.*" (Emphasis supplied.)

And again at page 94 of the Record it is stated:

> "No. 3 . . . Did the proposed inspection constitute an unreasonable and illegal search of the Appellant Earl Taylor's home, a wrongful trespass upon his property and a wrongful taking thereof *without due process of law*, all in violation of his constitutional rights under the fourth and *fourteenth amendments of the Constitution of the United States.*"

In the Notice of Appeal to the Supreme Court of the United States filed in the Supreme Court of Ohio on January 6, 1959, it is stated in pertinent part, as follows:

> "The Appellant Earl Taylor claimed that the housing and health ordinance was unconstitutional and that the proposed inspection constituted an unreasonable and illegal search of his home, a wrongful trespass upon his property and a wrongful taking thereof *without due process of law*, all in violation of his constitutional rights under the fourth and *fourteen amendments of the Constitution of the United States.*" (R. 95)

Again at page 96 of the Record it is stated, in pertinent part as follows:

> "No. 2 . . . Appellant claiming that said section of the ordinance [18099-Section 806.30 and 806.83] was *repugnant to the fourth and fourteenth amendments of the Constitution of the United States . . .*"
>
> "No. 3 . . . Did the proposed inspection constitute an unreasonable and illegal search of the Appellant Earl Taylor's home, a wrongful trespass upon his property and a wrongful taking thereof *without due process of law, all in violation of his constitutional rights under the fourth and fourteenth amendments of the Constitution of the United States?*" (Emphasis supplied in each of above quotations.)

Thus, it appears obvious from the foregoing quotations that the questions set forth in notices of appeal shows either

expressly or by "clear intendment"[3] that both the Due Process of Law Clause and the Equal Protection of the Laws Clause of the Fourteenth Amendment were properly raised in the Ohio courts in accordance with Rule 10 (2) of this Court.

ADDITIONAL ARGUMENT

I. The Validity of the Dayton Ordinance Under the Fourteenth Amendment Was Raised in All Ohio Courts

The question of the proper raising of a substantial federal question is lengthily argued in Appellant's substitute brief, pages 17-27. Extracts from appellant's briefs show that the alleged violation of appellant's rights under the Fourteenth Amendment were raised by brief in every Court (See extracts from briefs in Appx. of appellant's substitute brief, pages 42-47). In the opinion of the Trial Court, (R. 9-11) Judge Thomas distinguishes *Givner* v. *State of Maryland*, 124 A. 2nd 764, from the case at bar and refers to the Fourteenth Amendment.

The failure of the lower courts in their opinions to discuss at length the applicability of the Fourteenth Amendment of the United States Constitution is due to the fact that the Fourth Amendment to the United States Constitution and Section 14, Art. 1, of the Ohio Constitution are identical, except for two words. Hence, when the Ohio Courts ruled that the Ohio Constitution and the Fourth Amendment were not violated, obviously they did so in the erroneous belief that there was no need to draw upon the Fourteenth Amendment whose Due Process and Equal Protection Clauses are extended to cover illegal searches. Similarly, when the Ohio Court of Appeals reversed the Court of Common Pleas it did so basically on the questions of

[3] See People of State of New York *ex rel.* Bryant v. Zimmerman, 278 U. S. 63, cited at page 26 of substitute brief. Further discussion and additional supporting authorities appear at page 7 *infra*.

Ohio law which included the Fourth Amendment although this Court also discussed and quoted *Girner v. Maryland supra* (R. 23) and thus erroneously decided that the Fourteenth Amendment did not apply. The same question was before the Ohio Supreme Court and following the same erroneous reasoning it affirmed the Ohio Court of Appeals.

Logically, therefore, it seems crystal clear that both of the Ohio Courts must have decided the case in contemplation of appellant's rights as having been raised under the Fourteenth as well as the Fourth Amendment to the Constitution of the United States.

II. The Penalty Clause in the Present Case Is Distinguished From that in Frank v. Maryland

The differences in the penalty clauses of the Frank Case and the present one are material. The penalty assessed in the Baltimore Ordinance is a forfeit of twenty dollars. That in the Dayton Ordinance is a fine or not less than twenty dollars nor more than two hundred dollars or imprisonment of not less than two nor more than thirty days in jail or both and the offenses are cumulative; hence, as pointed out on page 16 of Appellant's Substitute Brief the fine and imprisonment which can be imposed under the cumulative provisions for violation are astronomical. Whereas, in the Baltimore Ordinance the forfeit is twenty dollars and no provisions for imprisonment are included.

This Court has held:

> "So in providing that the penalty may be sued for and recovered, as debts of like amount are recovered, we think it was intended that a reasonable preponderance of proof should be sufficient, that being one of the recognized incidents of an action of debt as well as of other civil actions." *U. S. v. Regan*, 252 U. S. 37 (1914).

The Baltimore Ordinance fixes a forfeit in money with no provisions for imprisonment. Hence, the penalty partakes of a civil rather than a criminal nature.

The contention of the appellee that the penalty clause of the Dayton Ordinance should not be considered, because it was not invoked, since appellant applied for a writ of habeas corpus before trial appears to be without merit. The Ordinance, including the penalty clause, were before the Court on a plea of unconstitutionality raised in a writ of habeas corpus and the Ordinance including the penalty clause is not severable.

III. No Particular Form of Words or Phrases Essential If Complete Record Shows, By Clear Intendment, Claim of Invalidity Was Timely Raised in State Court

The present case arises on an application for a writ of *habeas corpus*, and as was pointed out in appellant's substitute brief, (page 26) in the quotation from *People of the State of New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, where it is stated in pertinent part as follows:

> ". . . No particular form of words or phrases are essential, but only that the claim of invalidity and the grounds therefor be brought to the attention of the state Court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented . . .
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim that is enough." (See also additional authorities cited in notes 2 and 3 at page 67, supra.)

To the same effect see *Chesboro v. Los Angeles Co. Dist.*, 306 U. S. 459, where at page 463 it is stated:

> ". . . The validity of the statute under the federal constitution was by the petition appropriately drawn in question and in substance the decision of the state supreme court is in favor of its validity. See Bryant v. Zimmerman, *supra*.

". . . Nor do we find any merit in the contention tha the judgment rests upon an independent non-federa ground. *Judgment affirmed.*"

IV. The Dayton Housing Inspection Ordinance Denies to Appellant the Equal Protection of Laws

Section One, of the Fourteenth Amendment provides:

". . . nor shall any state . . . deny to any person withi its jurisdiction the equal protection of the laws."

Section 806-30 (R. 45) under heading Entry and Inspe tion of Dwellings states:

"The Housing Inspector is hereby *authorized* and *di rected* to make inspections . . . of dwellings . . . upo showing of appropriate identification the Housing In spector is hereby authorized to enter . . . *at any reaso able hour* all dwellings the owner or occupancy of ever dwelling . . . shall give the Housing Inspector fre access to such dwelling . . . for purpose of such in spection . . ."

There is no difference between the words "inspect" an "search". *District of Columbia* v. *Little*, 178 F. 2nd 13 (54). Section 2933.22, Ohio Code of Laws, provides in pe tinent part:

"A warrant of search or seizure shall issue only upo probable cause, supported by oath or affirmation par ticularly describing the place to be searched and th property and things to be seized." (R. 60)

The Dayton Housing Inspection Ordinance, (Sectio 806-83) provides for imposition of "a criminal penalty" of

". . . a fine of not more than twenty dollars ($20.00 nor more than two hundred dollars ($200.00) or b imprisonment of not less than two (2) days nor mor than thirty (30) days, *or both*,[4] and each day of failur

[4] The Dayton Ordinance provides for a "*criminal penalty*" Page 11 appellee's supplementary brief. In numerous referenc to Section 806.83, PENALTIES, the appellee has referred to or recite the provisions "be punished by a fine . . . or by imprisonment Invariably, in such references he has omitted the words, "*or both*"

to comply with any such provision shall constitute a separate violation." (R. 46)

Thus, it will be seen under the Dayton Ordinance the Housing Inspector is authorized and directed to make an *unlimited number of inspections* [searches] of all private homes. There is no let nor hindrance, except the arbitrary and capricious determination of the Housing Inspector. And if the private home owner refuses to "*give the Housing Inspector free access to such dwelling*", he does so at his peril and subjects himself to impositions of criminal penalties of fines and imprisonment, *or both*. Whereas, in contrast, under general law in Ohio, where persons are charged with a crime, the private home cannot be entered without the issuance of a warrant of search and seizure which shall issue only upon probable cause, supported by oath or affirmation. (Section 2933.22, R. C.)

Position of appellant is very simple. He does not allege that he is being treated any differently from any other private home owner in the city of Dayton. Indeed, under the doctrine announced by this Court in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, such a showing is not prerequisite to a claim of the denial by the state of the equal protection of the laws. *What appellant does allege is*, that the dwellings of all private home owners, similarly situated as he, may be arbitrarily inspected [searched] by the Housing Inspector an unlimited number of times without a search warrant or other process, whereas under general laws of Ohio the homes even of persons charged with crime cannot be entered without such process.

Mr. Chief Justice Taft stated:

> "The clause [The Equal Protection of the Laws] is associated in the Amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous . . . The guarantee was aimed at undue favor and

> individual or class privilege, on the one hand, and a hostile discrimination or the oppression of inequality on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process . . . Indeed, protection is not protection unless it does so." *Truax* v. *Corrigan*, 312 U.S. 331.

Accord: Shelley et ux. v. *Kramer et ux.*, 334 U. S. 1:

> "State action, *as that phrase is understood for the purposes of the Fourteenth Amendment, refers to the exertion of State power in all forms.*"

This Court in *Toomer* v. *Witsell*, 334 U. S. 385, quoting the decision of Mr. Justice Brandeis in *Standard Company Scale Co.* v. *Farrell*, 249 U. S. 571, at page 577 stated, as follows:

> "For the protection of the Federal Constitution applies [The Equal Protection of the Laws], whatever the form in which the legislative power of the state is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, like an ordinance of a municipality . . ." **(Citing cases)**

Scott v. *McNeal*, 154 U. S. 34:

> "The Fourteenth Article of Amendment of the Constitution of the United States . . . ordains, 'nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities." (Citing Cases) "And the first one, as said by Chief Justice Waite in United States v. Cruikshank, 92 U. S. 542, 544, repeating the words of Mr. Justice Johnson in Bank of Columbia v. Okely, 4 Wheat. 235, 244, was intended 'to secure the individual from arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice . . .'"

Mr. Justice Blackstone comments upon the desirability of the administration of "even handed justice." The appellant respectfully submits that where justice is hampered by the unequal administration of the criminal laws, i. e. as where under the Dayton Ordinance, the private home owner is subjected to searches [inspections] without any process at all, such action is an arbitrary denial of the Equal Protection of the Laws, which is prohibited by the Fourteenth Amendment.

CONCLUSION

The Trial Court held that appellant's rights under the Fourteenth Amendment to the Constitution of the United States were violated.

For the reasons set forth in this and prior briefs, we conclude with the Trial Court, that appellant Taylor was exercising his constitutional rights in refusing to admit the housing inspectors without a warrant or other process, and at which time the inspectors could state no cause nor show any emergency entitling them to entrance. Therefore, we believe the judgment of the Ohio Supreme Court affirming the decision of the Court of Appeals should be reversed, and the decision of the Trial Court affirmed.

Respectfully submitted,

ELBERT E. BLAKELY
GREENE CHANDLER FURMAN
Attorneys for the Appellant

SUPREME COURT OF THE UNITED STATES

No. 30.—October Term, 1959.

Ohio ex rel. Eaton, Appellant, v. Price, Chief of Police. } On Appeal From the Supreme Court of Ohio.

[June 27, 1960.]

Per Curiam.

The judgment is affirmed by an equally divided Court.

Mr. Justice Stewart took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 30.—October Term, 1959.

Ohio ex rel. Eaton, Appellant, v. Price, Chief of Police.	On Appeal From the Supreme Court of Ohio.

[June 27, 1960.]

Mr. Justice Brennan, with whom The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas join.

The judgment of the Ohio Supreme Court in this case is being affirmed *ex necessitate*, by an equally divided Court. Four of the Justices participating are of opinion that the judgment should be affirmed, while we four think it should be reversed. Accordingly, the judgment is without force as precedent. *The Antelope*, 10 Wheat. 66, 126; *Etting v. Bank of the United States*, 11 Wheat. 59, 78. In such circumstances, as those leading cases indicate, the usual practice is not to express any opinion, for such an expression is unnecessary where nothing is settled. But in this case even before the cause was argued, four Justices made public record of their votes to affirm the judgment, and their basis therefor. 360 U. S. 246, 248–249. These four Justices stated that they were "of the view that this case is controlled by, and should be affirmed on the authority of, *Frank* v. *Maryland*, 359 U. S. 360." Their opinion further states that they deemed "the decision in the Maryland case to be completely controlling upon the Ohio decision." In a longer opinion, one of the four Justices developed his views on the merits further. 360 U. S., at 249–250. The usual practice of not expressing opinions upon an equal division has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be approached with less com-

mitment. But the action we have described prevents this from being the case here; and so the reason for the usual practice is not applicable. Accordingly, since argument has been had, and votes on the merits are now in order, we express our opinion.[1]

This case involves Earl Taylor, who is in his sixties and has been working at his trade of plumber for 40 years, and the home at 130 Henry Street, in Dayton, Ohio, which he and his wife bought and in which they have lived for over a decade. He describes it as a little cottage, all in one floor, with a front room and a middle room, two bedrooms, a dining room and a little utility room, and a bathroom and little kitchen at the back. What was evidently Taylor's first involvement with the criminal law occurred in this fashion. One day three men who were housing inspectors came to his door, and said they wanted to come in the house and go through the house and inspect the inside of the house. They had no credentials, only a sheet of yellow note paper, and Taylor said to them, "You have nothing to show me you have got a right to go through my house." The response was, "We don't have to have, according to the law passed four years ago.[2]

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[1] Expressions of views, despite equal divisions, have been made before where there was a question whether one fact situation was to be distinguished from a related one on which a majority of the Court had rendered an opinion. *Raley* v. *Ohio*, 360 U. S. 423, 440–442, 442–445. The question whether this case is to be distinguished from *Frank* presents an analogy to this.

[2] The reference is apparently to the ordinance around which the case turns. Section 806–30 (a) of the Dayton, Ohio, Code of General Ordinances provides:

"The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby author-

Replied Taylor, "That don't show me that you got anything in there that you want for inspection, and, further, I don't have nothing in my house that has to be inspected." The man said, "Well, you know, according to this ordinance, that we got a right to go through your house and inspect your house." "No, I don't think you have, unless you got a search warrant," answered Taylor. This has been his position ever since, and it is the issue that divides us.

The men went away, but later there was a second attempt to gain access to Taylor's house, and a telephone call to the same end. Taylor said, "I don't see what right that you got coming into my house. Until you show me in writing, or some kind of facts, that you got a right to come into my house and inspect the house, I will not let you in." The third time the men came, there were two of them. One had some sort of credential with a photo on it. Neither had a warrant of any kind. One said the housing inspector wanted to inspect Taylor's house. Taylor said, "What do you have in there that you want to inspect? I have nothing in my house for inspection." He was told: "We have a right to come in your house, go through your house, inspect the whole inside of your house." Taylor's reaction to this was:

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ized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey."

This command is backed by the penalty that "Any person who shall violate any provision of this ordinance shall, upon conviction, be punished by a fine of not less than twenty dollars ($20.00) nor more than two hundred dollars ($200) or by imprisonment of not less than two (2) days nor more than thirty (30) days, or both, and each day of failure to comply with any such provision shall constitute a separate violation." § 806-83.

"You have nothing wrote down on paper. You don't have a thing to show me you are going to come in there to inspect anything, and as far as that goes you aren't coming in unless you have a search warrant to get in." The men never came back with a search warrant, but as they left, one said, "If you ain't going to let us in, we are entitled to get in, and if you don't let us in, I am going to leave it up to the prosecutor." Whereupon Taylor said "I don't care what you do. You aren't coming in." Taylor later testified that then the man "walked over and got in his car and that was the end of it."

But it was not. Taylor and his wife each received through the mail a registered letter from the city prosecutor, notifying them to appear at his office to answer a complaint against them. They did not appear; whereupon the police came to Taylor's home, and finally served him with a warrant—a warrant to appear in court to answer criminal charges brought against him for failing to admit the inspectors to his home. He appeared in court and was held for trial; and not being then able to make bond of $1,000, he was committed to jail, to await trial on the charges, which could have resulted in a fine of $200 and an incarceration of 30 days for each day's recalcitrance. One Eaton, an attorney, filed a petition for habeas corpus on Taylor's behalf in the State Common Pleas Court.[3] The Common Pleas Court found the ordinance unconstitutional, and discharged Taylor from cus-

[3] Evidently habeas corpus lies in Ohio to test the constitutionality of the ordinance under which one is being held through charges pending in a court of inferior jurisdiction, as all the state courts proceeded to pass on the merits of the claims of the relator Eaton, appellant here, that the ordinance under which the charges were brought infringed Taylor's constitutional rights. Accordingly we may now review that determination on the merits, the habeas corpus proceeding, independent of the criminal prosecution itself, having proceeded to a final judgment. *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 70.

tody; but the Court of Appeals reversed, 105 Ohio App. 376, 152 N. E. 2d 776, and its judgment was upheld by the Ohio Supreme Court. 168 Ohio St. 123, 151 N. E. 2d 523. We noted probable jurisdiction. 360 U. S. 246.

The municipal ordinance in question provides numerous requirements for dwellings, deemed by the city to be appropriate in the interests of the public health, safety and comfort. Several of the requirements apply to private dwelling houses, such as the Taylors'. None of these requirements is at all questioned here. What is questioned is the ordinance provision, Code of General Ordinances § 806–30, authorizing the Housing Inspector to enter at any reasonable hour any dwelling whatsoever, and commanding the owner or occupant to give him free access at any reasonable hour for the purpose of his inspection. It was armed with the naked authority of this provision, and not with any warrant (the ordinance provides for none) that the inspectors approached Taylor's door, even after he had made clear to them his intent not to admit them on this basis. Neither before a magistrate empowered to issue warrants, nor in this proceeding, have the inspectors offered any justification for their entry. They have not shown any probable cause for grounds to believe that a proscribed condition existed within the cottage, or even that they had suspicion or complaint thereof. They have not shown that they desired to make the inspection in pursuance of a regular, routinized spot check of individual homes, or in pursuance of a planned blanket check of all the homes in a particular neighborhood, or the like.[4] These might be said to be the usual reasons which would impel inspectors to seek to gain admittance to a

[4] Those desiring to make the inspection did not so testify; and such a planned blanket check, or its nature, are hardly inferable from Taylor's statement that "they had been going up and down there, door-to-door, looking through everybody's houses," the only thing resembling evidence on the point.

private dwelling; but none of them is shown by the reco
to have been present. Most significantly, on the initi
recalcitrance of Taylor, the inspectors were not requir
to, and did not, repair before any independent magistra
to demonstrate to him their reasons for wanting to ga
access to Taylor's cottage, and to obtain his warrant f
their entry—the authorization on which Taylor w
insisting. The judgment below is, on this record, bo
tomed on the proposition that the inspectors have t
right to enter a private dwelling, and the household c
be bound under criminal penalties to admit them, thou
there is demonstration neither of reason to believe the
exists an improper condition within the dwelling, nor
the existence of any plan of inspection, apart from such
belief, which would include the inspection of the dwel
ing in question. We think that affirmance of this jud
ment would reduce the protection of the household
"against unreasonable searches" to the vanishing point.

In support of the judgment below, much reliance at th
bar has been put on *Frank* v. *Maryland*, 359 U. S. 36
We would not be candid to say that on its own facts w
have become reconciled to that judgment. To us
remains "the dubious pronouncement of a gravely divide
Court." *Cooper* v. *Aaron*, 358 U. S. 1, 24 (concurrin
opinion). "A single decision, by a closely divided cour
unsupported by the confirmation of time, cannot check
the course of constitutional adjudication here. Se
Kovacs v. *Cooper*, 336 U. S. 77, 89 (concurring opinion
We continue to go with Judge Prettyman in *District o*
Columbia v. *Little*, 178 F. 2d 13, 17, aff'd on other grounds
339 U. S. 1, that: "To say that a man suspected of crim
has a right to protection against search of his home with
out a warrant, but that a man not suspected of crime ha
no such protection, is a fantastic absurdity." Nothin
demonstrated in the *Frank* case indicates otherwise to us
But the present case goes much further than *Frank*; an

as to the reasonableness of searches, it has been stressed that factual differences may weigh heavily *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357. The search in *Frank* was for the nesting place of rats. There were ample grounds on the part of the inspecting officer to believe its existence in the house. There had been complaint of rats in the neighborhood; and an external inspection of the house in question revealed that it was "in an extreme state of decay" and that behind it there was a pile of "rodent feces mixed with straw and trash and debris to approximately half a ton." See 359 U. S., at 361. The case was decided by the narrowest of divisions; and one member of the majority found it necessary to express in a concurring opinion that the sole purpose of the search was an attempt "to locate the habitat of disease-carrying rodents known to be somewhere in the immediate area." 359 U. S., at 373. There was no case of a "systematic area-by area search" before the Court; and although certain remarks were made as applicable to such a search, 359 U. S., at 372, their character as dicta is patent. Thus, even accepting the judgment in *Frank*, of such expressions the classic language of Justice Brandeis, dissenting in *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 619, can be said again: "It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen."

In this case we pass beyond the situation in *Frank*, where the inspector was looking for a specific violation, and where he had, and was able to demonstrate, considerable grounds to believe it existed in Frank's house. Here it would appear from Taylor's testimony that, even without a warrant, if a specific matter was cited to him by the inspector, he would have permitted the inspection in that regard. On the contrary, Frank's denial of access

was described as based on "a rarely voiced denial
any official justification for seeking to enter his home
359 U. S., at 366. There then was a specific deman
for inspection, met by a refusal on the broadest
grounds. Here we have the most general of demand
supported hereby no particularized justification, eith
directed at the conditions in Taylor's cottage or
terms of some over-all systematic plan which woul
include it. This is met not by an attitude of defiance
but by a request by the householder that a specific autho
ization be furnished him. Not a search warrant, but
criminal complaint is the upshot. We would grossly to
down the protections afforded the householder by the Co
stitution were we to put an authoritative sanction on th
judgment that condemns his refusal.

Much argument is made of the need of the authority
to perform inspections on a "spot check" or on an area-by
area basis. The judgment below cannot be said to pre
sent this problem, because there was no evidence tha
this in fact was what was being done; that the inspecto
in fact were proceeding according to a reasonable pla
of one sort or another. For all that appears here, th
inspectors could have been acting in accordance with a
particular plan of spot checks or area-by-area searche
which could be justified as "reasonable," and which woul
give probable cause for entry;[5] their action could hav
been based on caprice or on personal or political spite
It hardly contradicts experience to suggest that th
practical administration of local government in th
country can be infected with such motives. Buildin
inspection ordinances can lend themselves readily to suc
abuse. We do not at all say this to be the case here, a
Taylor has made no proof of it, to be sure; but that simp
points up the issue. The inspectors have not be

[5] See *Frank* v. *Maryland*, *supra*, at 383 (dissenting opinion).

required to make any justification for their entry. The judgment below upholds the charges as sufficient as based on a demand for entry without any such justification.

But if we were to assume that the inspectors were proceeding according to a plan, and even if evidence of the plan were put in at the trial, we think that the result should be the same. The time to make such justification is not in the criminal proceeding, after the householder has acted at his peril in denying access. The time to make it is in advance of prosecution, and the place before a magistrate empowered to issue warrants, which will put the seal of legitimacy—the seal the Constitution specifically provides for—on the demand of the inspector, if indeed it is a reasonable one. Such a warrant need not be sought except where the householder does not consent. This is precisely the procedure followed by England in this particular area, see Public Health Act, 1936, 26 Geo. 5, & 1 Edw. 8, c. 49, § 287 (2);* and no complaint is heard that this stultifies enforcement there of the regulation of the public health and safety. Certainly with this procedure available—the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment, see *McDonald* v. *United States*, 335 U. S. 451, 455–456—there is no need to be satisfied with lesser

*The procedure cited is that prescribed by statute in the case of health inspections under the Public Health Act. There are other statutes providing for other inspections, an English commentator points out, which do not contain this safeguard. See Waters, Rights of Entry in Administrative Officers, 27 U. of Chi. L. Rev. 79, 85. Accordingly, "the private occupier is faced with a bewildering number of persons claiming a variety of rights." *Id.*, at 83. The author is in favor of the Public Health Act procedure, and regrets that "the consistent application to good works is yet lacking." "The object should be the creation of warrant provisions in a statutory code of powers of entry, guaranteeing to the individual thereby the impartial, if rarely invoked, judgment by magistrates of the fairness and legality of any attempted entry." *Id.*, at 93.

standards in this area. Cf. *Dean Milk Co.* v. *Madison*, 340 U. S. 349. The public interest in the cleanliness and adequacy of the dwellings of the people is great. So too is the public interest that the tools of counterfeiting and the paraphernalia of the illicit narcotics traffic not remain active. On an adequate and appropriate showing in particular cases, the privacy of the home must bow before these interests of the public. But none of these interests provides an open sesame to those who enforce them. The Fourth Amendment's procedure establishes the way in which these general public interests are to be brought into specific focus to require the individual householder to open his door.

It has been suggested that if the Fourth Amendment's requirement of a search warrant is acknowledged to be applicable here, the result will be a general watering-down of the standards for the issuance of search warrants. For it is said that since it is agreed that a warrant for a health and safety inspection can be made on a showing quite different in kind from that which would, for example, justify a search for narcotics, magistrates will become lax generally in issuing warrants. The suggested preventive for this laxity is a drastic one: dispense with warrants for these inspections. We cannot believe that here it is necessary thus to burn down the house to roast the pig. To be sure, the showing that will justify a housing inspection to check compliance with health and safety regulations is different from that which would justify a search for narcotics. But we should not assume that magistrates will become so obtuse as not to bear this in mind. Search warrants to look for counterfeiting equipment, for example, are not issued on a showing of probable cause to believe the existence of an untaxed still. To each specific warrant, an appropriate specific showing is necessary. This can scarcely be thought to tax the capacities of the magistrate. And of course where the rule prevails that evi-

dence obtained in violation of the constitutional guarantee is not admissible, there will be judicial review of the magistrate's action if the fruits of a search are tendered in evidence.[1]

Apart from the very significant factual distinctions presented by this case from the *Frank* case, there is another reason why we would reverse the judgment here. It has now become clear that the *Frank* decision may have turned in substantial part on the positing of a distinction between the affirmative guaranty of privacy against official incursion raised by the Fourth Amendment against federal action, and that raised by the Due Process Clause of the Fourteenth against state action. The concurring opinion of one of the majority in that sharply divided decision indicates some concern in that respect. 359 U. S., at 373. After the greatest consideration, this Court in *Wolf* v. *Colorado*, 338 U. S. 25, 27, declared: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." It is now clear that part of the majority of the Court in the *Frank* case does not subscribe to the clear import of that statement. *Elkins* v. *United States*, *ante*, pp. —, — (dissenting opinion). But the *Wolf* statement continues to be the ruling doctrine in this Court. *Elkins* v. *United States*, *ante*, p. —. The guarantees are of the same dimension, matters of enforcement, such as the exclusionary rule, aside.

The classic debate on the import of the Fourteenth Amendment's Due Process Clause as to the applicability of the Bill of Rights to the States, we submit, does not even involve the theory that the matter is one for the

[1] See *Weeks* v. *United States*, 232 U. S. 383.

judges to solve on an *ad hoc* basis, according to their overall reaction to particular cases. Some of us have expressed the conviction that the preferable view of the Fourteenth Amendment is that it makes the guarantees of the Bill of Rights generally enforceable against the States. See *Adamson* v. *California*, 332 U. S. 46, 68 (dissenting opinion). But to them, as well as to us, who have neither accepted nor rejected that view, it is clear that the celebrated passage of Justice Cardozo's opinion in *Palko* v. *Connecticut*, 302 U. S. 319, 323–325, can have no common ground with the view of the *Wolf* case that a minority of the Court now expounds. And see *Adamson* v. *California*, *supra*, at 85–86, 89 (dissenting opinion). For the *Palko* opinion refers to "a process of absorption," 302 U. S. at 326, of specific Bill of Rights guarantees in the Fourteenth Amendment's standard.* It is not a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before us. To be sure, the contrary view has been urged, occasionally with success; the right to counsel was put on an *ad hoc* basis, *Betts* v. *Brady*, 316 U. S. 455, despite what seems the clear implication to the contrary in *Palko*, 302 U. S., at 324; and recently the surprising suggestion has even been made (never by the Court) that the freedom of speech and of the press may be secured by the Fourteenth Amendment with less vigor than it is

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* "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . . This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. . . ." 302 U. S., at 326–327.

secured by the First. See *Beauharnais* v. *Illinois*, 343 U. S. 250, 288 (dissenting opinion); *Roth* v. *United States*, 354 U. S. 476, 505–506 (separate opinion); *Smith* v. *California*, 361 U. S. 147, 169 (separate opinion).[2]

In *Elkins* today we have rejected such a view of the affirmative guarantees of the Fourth Amendment. The opinion of the Court in *Frank* is very likely a product of such a rejected approach. For that reason, even if it were on all fours with the present case, it should not be followed, and the judgment below should be reversed.

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[2] Contrast the statement in *Palko*, 302 U. S., at 324. For the latest of many reiterations of the settled doctrine that the First Amendment's guarantees obtain against the States, see *Smith* v. *California*, 361 U. S. 147, 149–150; *Bates* v. *Little Rock*, 361 U. S. 516, 522–523. See *Staub* v. *Baxley*, 355 U. S. 313, 321. For a collection of many of the cases to this effect, see *Speiser* v. *Randall*, 357 U. S. 513, 530 (concurring opinion).